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JUDGES
OF THE
HIGH COURT OF JUSTICE
DURING THE PERIOD OF THESE REPORTS.

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-

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ERRATA ET ADDENDA.

The sign — following the number indicating the line signifies that it is to be reckoned from the bottom of the page.

- Page 28. Line 14 of headnote delete "as" before "those."
- " 36. " 4—for "Natural" read "National."
- " 73. " 18—for "Regina" read "Rex."
- " 73. " 20 delete full stop and put colon.
- " 73. " 8—for "following" read "followed."
- " 103. " 11—for "*naturâ*" read "*materiâ*."
- " 153. " 3 of catchwords for "sub-sec. 4" read "sub-sec. 14,"
same in line 7 of headnote.
- " 336. " 18—for "Climie" read "Cline."
- " 337. " 7 for "*Miller v. Trimble*" read "*Trimble v. Miller*."
- " 339. " 7—for "Climie" read "Cline."
- " 348. " 4 for "B. & C." read "B. & S."
- " 380. " 12, and throughout the case, for "Blackmore" read
"Blakemore."
- " 451. " 2—for "Dorey" read "Davey."
- " 456. " 6—after 359 add "15 P. R. 381."
- " 522. In headlines and in headnote for "56 Vic. ch. 53" read "53
Vic. ch. 56."
- " 539. Line 14 for "Burridge" read "Bremridge."
- " 562. " 6 add "24 O. R. 246."
- " 614. " 14 for "14 C. L. J. 5" read "21 A. R. 87."
- " 639. " 18 for "Pape" read "Page."

REPORTS OF CASES

DECIDED IN THE

QUEEN'S BENCH, CHANCERY, AND COMMON
PLEAS DIVISIONS

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

[QUEEN'S BENCH DIVISION.]

GRAVEL v. L'UNION ST. THOMAS.

*Life Insurance—Benefit Society—Expulsion of Member—Fair Trial—
Report of Committee—Evidence not before Committee—Absence of
Member.*

The plaintiff, as executor of his deceased son, sued the defendants, an incorporated benefit society, to recover the money benefit accruing upon the death of a member. Before the death the defendants had passed a resolution removing the son from the list of members, on the ground that he had given untruthful answers to questions as to his state of health put to him upon his admission. The complaints against him had been referred to the committee of management, who had reported in his favour, but the society at a meeting refused to adopt the report, and, in the absence of the deceased, without any notice to him or opportunity of appearing, accepted an *ex parte* statement made by a member present at the meeting, which had not been before the committee, and acted upon it by forthwith passing the resolution referred to. By the rules of the society it was provided that if it should be established that a new member had not answered truthfully, he should *ipso facto* be excluded from the society; and also that if it was proved after his admission that he had not answered truthfully, he should, by reason thereof, be struck off the list of members. The committee of management was the body appointed under the rules to take the evidence and find the facts, their report being subject to confirmation or rejection by the society:—

Held, that, upon the principles governing such an inquiry, the person accused should not be condemned without a fair chance of hearing the evidence against him, and of being heard in his own defence; that the action of the defendants was contrary to these principles and to their own rules; and, therefore, the expulsion was not legally accomplished, and the plaintiff was entitled to recover.

Statement. ACTION tried at the Ottawa Spring Assizes, 1893, before FALCONBRIDGE, J., and a jury.

The plaintiff, Napoleon Gravel, in his statement of claim alleged that on 31st August, 1891, his son Joseph Octave Gravel became a member of the defendants' society, a benefit society incorporated under the Benefit Societies' Act of Ontario, and remained a member until his death, which occurred on 30th March, 1892; that, under the rules of the society, upon the death of the said Joseph Octave Gravel the plaintiff, as his executor, became entitled, after thirty days' notice, to receive from the defendants the sum of \$600, being one dollar for each member of the society; that the plaintiff gave notice of the death of the said Joseph Octave Gravel to the society, and claimed the amount so payable, but the defendants refused to pay it, and pretended that he had been expelled, and his name erased from the list of members, before his death; that if the defendants had so expelled him and erased his name, their action in so doing was illegal and void, and without just cause, and without any proper trial, or giving him an opportunity to be heard and to make his defence; that all things had happened to entitle the plaintiff to recover the said money; and he claimed a declaration that Joseph Octave Gravel was a member of the defendants' society at the time of his death; that if the defendants pretended to expel him from the society, or to erase his name from the list of members, such expulsion and erasure were null and void; payment of the sum of \$600; and an order, if necessary, to compel the defendants to collect the amount from their members

The defendants in their statement of defence denied that Joseph Octave Gravel ever became a member of their society; and alleged that if he ever did become such member he ceased to be such member on 29th February, 1892, when, after due notice to him of an intention to propose his expulsion, and after affording to him full opportunity of defending himself, in good faith and in conformity with the rules of the society by which as a member he was

bound, he was duly expelled from the society, and his name was erased from the list of members; that such expulsion and erasure were for good cause under the rules of the society, and that the society having jurisdiction in the premises, and having strictly complied with its rules, the Court could not be asked to interfere. Statement.

Issue was joined upon this defence.

It was proved at the trial that the defendants were a benefit society incorporated under ch. 172, R. S. O.

The rules of the society were proved. The material ones were as follows :

"Art. 21. Any French Canadian by birth, * * * aged not less than sixteen nor more than forty-five years, enjoying a good reputation and good health, having no infirmity * * * may be a member of this society."

"Art. 24: The new member shall upon his honour answer to the following questions which shall be put to him by the president; and if it shall be established at any time that he has not answered truthfully, he shall by that very fact be excluded from the society, and he shall lose the money he has paid; and, in the event of his death, his heirs shall lose the benefits to which they would otherwise have had a right." The seventh question was the material one here: "Are you free from all hereditary or incurable diseases, or from any infirmity whatsoever?"

"Art. 27. The new member, after having replied to the president's questions in a satisfactory manner, and having signed them, shall receive from the recording secretary a card certifying the date of his admission, signed by the president and the recording secretary."

"Art. 70. If the answers of any candidate to the president should shew that he is disqualified according to the conditions of the 21st Article, his admission shall be considered void. Moreover, if it is proved afterwards that he has not answered truthfully he shall by reason thereof be struck off the list of members, and he shall lose the money he has disbursed."

"Art. 80. The expulsion of a brother may also be pro-

Statement. nounced by a majority of members present in the following cases : (1) The employment of illegal means to obtain the assistance of the society ; (2) The commission by any member of any act casting a slur on the honour or on the morals of the society, or on his own honour. * * The society may also suspend or strike out the name of any member for reasons other than those provided for (prévues) by the by-laws or the constitution. The member accused shall be required by letter sent to his last official address to appear before the committee of management within the fifteen days which follow the date of the notice, to answer the accusations made against him, and in default of his appearance the accused member may be suspended or expelled. If the accused member be absent from the town, he may exculpate himself in writing within one month after the notice which shall have been transmitted to him ; all such suspensions or erasures shall be decreed by the majority of the members present, on a report which shall be made by the committee of management after inquiry as aforesaid ; but in case the committee of management shall find that the accusation is without foundation, it shall not be bound to make a report to the society except in cases where the accusation shall have been made at a regular meeting."

" Art. 85. A motion which has been adopted may always be rescinded at the following meeting by the votes of two-thirds of the members present, provided that notice of motion to rescind has been given one week before it is taken into consideration."

It was proved at the trial that the deceased Joseph Octave Gravel had applied for admission into the society, and that he had answered the seventh question put to him under Article 24 in the affirmative, and had received his card under Article 27, certifying that he was admitted a member on 31st August, 1891, and that he had paid all dues until the society refused to receive any further sums from him.

At a meeting of the society held on 14th December,

1891, a resolution was carried reciting that the society had been informed that Joseph Octave Gravel had deceived it in not giving true answers to the questions of the president in regard to his health ; that under the circumstances the society believed it ought to warn him that it intended to be relieved of its responsibility to him and his heirs until he should have given satisfactory explanations ; and that he appear before the society on Monday 21st December, 1891. Statement.

At the meeting on 21st December, 1891, Joseph Octave Gravel appeared and produced a statutory declaration that the answers made by him upon his admission to the society were true ; he was then cross-examined, and stated that he left the institution of the Christian Brothers at Montreal because he felt weak and believed that he could not teach ; that about the middle of September, 1891, he consulted Dr. O'Brien, of Ottawa, on the state of his health, and that the latter declared to him that he was a consumptive, and had a diseased lung ; that he may have said that he had doubts concerning his admission on account of his rather unsatisfactory health.

It was then moved and carried that the question be referred to the committee of management.

Prior to this meeting a notice had been sent to Joseph Octave Gravel requesting his presence at it to make his defence to a motion which would be made at it to erase his name from the list of members for not having answered the truth to the questions of the president at the time of his admission.

On 18th January, 1892, the committee of management reported to a meeting held on that evening that they thought they could prove that Joseph Octave Gravel was really sick at the time of his admission to the society, and that in consequence it recommended the erasure of the name of Mr. Gravel for next Monday, 25th inst., and that he be notified to be present at the meeting of Monday 25th inst. to defend himself.

At the meeting of 25th January, 1892, a certificate was produced from Dr. Valade that Mr. Joseph Octave Gravel

Statement. was sick and unable to leave his room, and a letter from him that he had authorized his father to protest in his name if his expulsion were proposed. A motion was passed at this meeting that the report of the committee of management recommending the removal of Joseph Octave Gravel be adjourned, and that he be requested to produce an affidavit that in his soul and conscience he enjoyed perfect health at the time of his admission on 31st August, and that he did not at that date feel any attack of the disease from which he was now suffering, or any other disease.

On the 1st February, 1892, Joseph Octave Gravel made and forwarded to the society a declaration in which he stated that at the time he was admitted into the society he considered his health good enough to permit him to believe that he was qualified to become a member of the society; that, not knowing the disease from which he was now suffering, it was impossible for him to say if he was at the time of his admission afflicted by this same disease, or by any other incurable disease; and that the answers made at the time of his admission on his honour and conscience were in conformity with the truth according to him.

On the 22nd February, 1892, the committee reported that this declaration was not in accordance with the one which the society decided to obtain from him, and asked that the settlement of the affair should be left in their hands for a week.

On the 29th February Joseph Octave Gravel wrote refusing to make the declaration tendered to him, repeating in substance the reasons before given by him, and again protesting, and notifying them that he authorized his father to protest, against the proposed expulsion.

On the same day the committee of management made their formal report as follows:

“The committee, by reason of the proofs, which it considers uncertain, cannot recommend the striking out of the name of the said Joseph Octave Gravel, although in the opinion of all the members of the committee the young man was sick at the time of his admission. The fact that

he has refused to swear the affidavit annexed forces them Statement.
to this opinion."

It was then moved, "that Mr. Joseph Octave Gravel having refused to take oath that he did not feel any effects of the disease from which he is actually suffering, or from any other disease, at the time of his admission * * * the report of the committee of management, which has just been read, be not adopted, but that Mr. Gravel be removed from the list of our members."

The official report of the discussion proceeded: "During the course of the discussion Mr. Pierre Poirier declares to the meeting that Mr. Joseph Octave Gravel told his sons in his presence, and that of his wife, and that during the month of August last—he could not give the precise date—but he said that Mr. Gravel was passing for the census, but before the said Mr. Gravel was admitted a member of the society, that he, Mr. Gravel, had left the Institution of the Brothers, because doctors of Montreal had told him that he was in consumption. Mr. Poirier added that he was ready to swear to what he had just said whenever the society desired it. The recording secretary rises and says that for his part, if he had known this statement of Mr. Poirier before, he would have endeavoured to give an entirely different report than the one which was now submitted. After some minutes of discussion the ballot is asked and the motion is carried. The president then orders the collectors to remove the name of Mr. Gravel from their books. Mr. Gravel senior rises to say that he protests in the name of his son."

At the meeting on the 7th March, 1892, Mr. Poirier informed the members that he was mistaken in saying that the statement made by Joseph Octave Gravel which he had mentioned at the last meeting was made in August; he should have said that it was made in April. At the same meeting a letter from Joseph Octave Gravel to the president was read in which he denied the truth of the statement made by Mr. Poirier.

On 4th April, 1892, the plaintiff wrote the defendants

Statement. informing them of the death of Joseph Octave Gravel on 30th March, 1892; in reply to which the secretary was requested to remind the plaintiff that his son had not been a member since 29th February.

Evidence was given at the trial on the part of the defence of statements made by Joseph Octave Gravel in April, 1891, that he was sick and had a cough; and Poirier was called and repeated the statement he had made as to what Joseph Octave Gravel had told him as to his reason for leaving the Christian Brothers. On the other hand the doctors who were called, and who had seen him from the middle of December to the time of his death, stated that he died of a galloping consumption, and in their belief had been ill but a short time before they saw him. The learned Judge submitted the following questions to the jury: "First, was the answer to the question that the deceased was on 31st of August, 1891, exempt from all hereditary or incurable diseases, or from any infirmity whatever, true in fact?" To which the jury answered, yes.

"Second, if the answer was not true in fact, was such answer untrue to the knowledge of the deceased or made in the honest belief that it was true?" Having answered the previous question in the affirmative, the jury did not answer this question.

Upon this finding judgment was entered in favour of the plaintiff for \$564 with costs.

It was proved during the trial that there were 564 members of the society subject to an assessment for this claim.

At the Easter Sittings of the Divisional Court, 1893, the defendants moved to set aside this judgment, and to enter judgment for the defendants, or for a new trial upon the following amongst other grounds: that the finding of the jury was contrary to the evidence; that the evidence shewed Joseph Octave Gravel for some time previous to and on the 31st August, 1891, had been suffering from consumption; that he never became a member of the

society, or entitled to claim its benefits; that if ever a member, he ceased to be one on 29th February, 1892, when he was expelled from it according to its rules for good and sufficient cause; and that this Court has no jurisdiction to reverse the decision of the society; and that the plaintiff should have availed himself of the redress provided by the by-laws before coming to this Court. Statement.

The motion was argued on 26th May, 1893, before the Divisional Court [ARMOUR, C. J., and STREET, J.]

Shepley, Q. C., and *G. F. Henderson*, for the defendants.

D. B. MacTavish, Q. C., for the plaintiff, cited *Willis v. Wells*, [1892] 2 Q. B. 225.

June 10, 1893. The judgment of the Court was delivered by

STREET, J. :—

Nowhere in the rules of the society is any power expressly given to its members to determine whether the answers given to the questions put to new members upon entrance into the society are true or false. The 21st Article mentions good health and freedom from infirmity as two of the qualifications for membership; the 24th Article provides that if it shall be established at any time that the new member has not answered truthfully, he shall *ipso facto* be excluded from the society; and Article 70 enacts that if it is proved after his admission that he has not answered truthfully he shall by reason thereof be struck off the list of members. Under the head of "Expulsions" a number of causes are set forth for which a member may be expelled in Articles 79 and 80, none of which appear to me clearly to include the making of untruthful answers to the questions submitted on admission; the nearest approach to it is to be found in clause (2) to Article 80, viz.: "The commission by any member of any act casting a slur on the honour or on the morals of the society

Judgment. or on his own honour." This may perhaps be held to
Street, J. cover the case in point, and if so, the members had jurisdiction to inquire into the truth of the answer given by Joseph Octave Gravel to question number 7.

It is, however, unnecessary in the present case to determine whether the jurisdiction existed, because I am clearly of opinion that the inquiry was not conducted in accordance either with the rules of the society, or with the principles which should govern such inquiries, and that therefore the expulsion of Joseph Octave Gravel was never accomplished.

Under Article 80, the committee of management is the body appointed by the rules to take the evidence and find the facts, their report being subject to confirmation or rejection by the general body of members. This committee, having considered the matter for several weeks, notice having been duly given to the accused, finally reported that the proofs were too uncertain to justify it in recommending his expulsion. Whether it was competent for the general body of members under the rules to reverse a decision of "not proven" arrived at by the committee, and to decide, without hearing the evidence upon which the committee had arrived at that decision, that that decision was wrong, is at least open to grave question; but it is perfectly clear that the meeting could not hear new evidence which had not been before the committee at all, and which the accused had no opportunity of answering, and upon that new evidence decide on the spot that the accused was guilty, and proceed to expel him. That is the course, however, which the society took in the present case. The report of the committee was set aside and the accused was expelled upon an *ex parte* statement made during its discussion by one Poirier of a conversation he had had with the accused: this was entirely new matter, and no opportunity was given the accused, who was not present, to answer or explain it.

It is one of the fundamental principles of every judicial inquiry, whether conducted in a court or by a body such

as this, that a person accused shall not be condemned without a fair chance of hearing the evidence adduced against him and of being heard in his own defence. Up to the time the committee made their report, there was nothing to find fault with in the manner in which the inquiry was conducted, and their report was in favour of young Gravel. The proceedings at the meeting at which the report was considered, however, were a gross violation of fair play, and the conclusion at which the members then arrived cannot be treated as having any effect upon the *status* of the accused as a member of the society: *Fisher v. Keane*, 11 Ch. D. 353; *Lubouchere v. Wharncliffe*, 13 Ch. D. 346.

Judgment.

Street, J.

It is suggested that the accused should have adopted the means provided by the rules for rescinding a resolution. The only means I can find is Article 85, but he was, according to the resolution of 29th February, 1892, no longer a member of the society, and would have been told by the defendants that he could not move a resolution at a meeting.

Not having been lawfully expelled from the society during his lifetime, I think he must be treated as having been a member at the time of his death. That disposes of the only issue raised upon the record here.

The learned Judge, however, upon the contention of the defendants that untrue answers to the questions proposed to the new member, *ipso facto*, disqualified him from participation in the benefits of the society, submitted to the jury certain questions, in answer to which they found that the answer relied on by the defendants as being untrue was in fact true. We are now asked to grant a new trial because this finding is contrary to the weight of evidence. In my opinion, upon this record the question was immaterial, and, therefore, no new trial should in any event be granted; but if it be material, I think we should not grant a new trial, for the reason that there was evidence to go to the jury in favour of the truth of the statement upon which the finding might properly have been based, and, therefore, upon well known principles, we should not interfere.

The motion should be dismissed with costs.

[QUEEN'S BENCH DIVISION.]

YORK ET AL. V. TOWNSHIP OF OSGOODE ET AL.

Waters and Watercourses—Ditches and Watercourses Act—Award—Affirmance by County Judge—Jurisdiction of Engineer of Municipal Corporation—Determination by Court—Requisition—Assent of Majority of Owners—Notice—"Owner," meaning of—Tenant at Will—Benefit from Work to be done under Award—Notice of Letting Work—Time.

1. Where the engineer of a municipal corporation purports to make an award under the Ditches and Watercourses Act with respect to the making of a drain, the affirmance of such award by the County Court Judge does not preclude the High Court from entertaining the objection that the engineer had no jurisdiction to make the award; nor is such an objection one for the determination of the County Court Judge alone.

Murray v. Dawson, 17 C. P. 588, distinguished.

2. In the absence of a resolution of the municipal council such as is provided for by sec. 6 (b) of the Ditches and Watercourses Act, R. S. O. ch. 220, the question whether the engineer has jurisdiction to make an award depends upon whether, before filing the requisition, the owner filing it has obtained the assent in writing of a majority of the owners affected or interested, as provided by sec. 6 (a); if he has obtained such assent, the engineer is immediately upon such filing clothed with jurisdiction; and the absence of the notice (Form D.) required by sec. 6, would not deprive him of such jurisdiction, but would form only a ground of appeal against his award.
3. The assent of the municipal corporation as one of the land-owners interested may be shewn by resolutions passed by the council directing the engineer to proceed with the work.
4. The term "owner" as used in the Act means the assessed owner; and a tenant at will may be an owner affected or interested within the meaning of the Act.
5. The decision of the County Court Judge as to matters over which the engineer has jurisdiction cannot be reviewed by the Court; and whether the plaintiffs were benefited by the proposed work was a matter to be determined by the engineer and the subject of appeal to the County Court Judge.
6. The mere publication by the engineer, within a year after the affirmance of an award, of a notice that he would let the work to be done upon the land of one of the persons affected by the award, and that such letting would take place after the expiry of a year from such affirmance, does not afford any ground for an action of trespass.

Statement.

THIS was an action brought by James York the elder, James York the younger, and Isaac York, against the municipal corporation of the township of Osgoode, John Bower Lewis, and certain other persons who were the owners of lands in the 6th concession of that township, with respect to a certain ditch or drain proposed to be constructed,

under the Ditches and Watercourses Act, through lands in the 6th and 7th concessions of the township. Statement.

The plaintiffs alleged that they were the owners of certain lands in the 6th concession; that the defendants the township corporation had jurisdiction over the highway between the 6th and 7th concessions; that the defendant Lewis was the township engineer; that the defendants George Comrie and William Comrie were not the owners of any lands in the township; and that the other defendants were the owners of certain lands in the 6th and 7th concessions.

The plaintiffs further alleged that the defendant George Comrie, on the 25th August, 1891, filed with the clerk of the township a requisition for the construction of a ditch or drain through certain specified lands, which requisition was signed by William McRostie, George Comrie, Hugh McAlindon, George Popham, James McCurdy, and William Comrie, and designated, as the lands through which it would be necessary to continue the ditch, the lands of the six persons signing the requisition, and the lands of the plaintiff James York the elder, John Carson, Mrs. Peter McRostie, and the township corporation as owners of the highway.

The plaintiffs further alleged that the defendant Lewis, as engineer, had made an award with respect to the proposed ditch, from which the plaintiff James York the elder had appealed to the County Judge, who had confirmed it except as to the time of doing the work under it.

The plaintiffs complained that their lands would not be benefited by the making of the proposed ditch; that the plaintiffs James York the younger and Isaac York were not mentioned in the award, nor were their lands or those of their co-plaintiff declared to be benefited by the proposed drain, yet they were held liable to make part of the drain, and their lands were burdened therewith; that the defendant George Comrie never was the owner of any land in the 6th or 7th concession, and had no authority to originate the requisition or to be a party to it or to the award;

Statement. that the assent in writing of a majority of the owners affected or interested was never obtained to the construction of the ditch ; and that the award was bad because it did not specify the locality, description, and course of the ditch or drain, nor the portion thereof to be done by the respective owners.

And the plaintiffs claimed: (1) A declaration that the defendant Lewis had no jurisdiction to make the award, and that the County Judge had no jurisdiction to make any order in appeal confirming the same, and that the award and order were null and void. (2) A declaration that the alleged award and Judge's order were not binding on the plaintiffs, or on any or either of them, and that they or any of them were not bound to make any part of the drain. (3) A declaration that the alleged award was not binding on the lands of the plaintiffs mentioned therein, or on any of them. (4) A declaration that the defendant Lewis was not entitled to let the construction of the drain mentioned in the alleged award on the 28th October, 1892. (5) An injunction restraining the defendants from letting or constructing the work at the expense of the plaintiffs, or entering upon the lands of the plaintiffs, and restraining the defendants the township corporation from paying therefor or assessing the cost thereof against the lands of the plaintiffs. (6) Damages respectively for any trespass the defendants, or any of them, might commit on the lands of the plaintiffs in or about the construction of the drain, and for any injury they might respectively suffer from the construction of the drain. (7) And such further and other relief as to the Court should seem meet.

The defendants alleged that the defendant George Comrie was the owner of lot 27 in the 7th concession, and admitted that he had filed the requisition as alleged by the plaintiffs.

They further alleged that all the proceedings for the making of the award were had and taken as required by the Ditches and Watercourses Act ; that the award was properly made, and the order of the County Judge was

finally conclusive and binding upon the parties, and the Statement.
plaintiffs were estopped by it, and they submitted that the
action was not maintainable.

Issue was joined upon the defence.

An application was made by the plaintiffs for an interim
injunction, which was granted, and upon motion to con-
tinue it the following judgment was delivered :—

November 16, 1892. GALT, C. J. :—

This was a motion to continue an interim injunction
granted by the Judge at Ottawa. *Aylesworth*, Q. C., for
the motion. *Henderson*, contra. On the motion being
reached, Mr. Henderson took the preliminary objection
that this action did not lie, or rather that the rights of the
parties were concluded by the finding of the learned County
Judge on the award of the engineer.

These proceedings were taken under the provisions of
ch. 220, R. S. O., "An Act respecting Ditches and Water-
courses." The plaintiffs are the father and two sons.
Shortly before these proceedings commenced the father
had conveyed the portions of the lands affected to his
sons. All the preliminary steps were done with his know-
ledge, he was examined as a witness before the engineer,
and was the appellant before the County Judge under
sec. 11. The learned Judge heard the appeal and affirmed
the award, with the exception of two pieces of land, which
he decided in favour of the appellant James York. This
judgment was given on 31st October, 1891.

By sec. 11, sub-sec. 4, "The Judge shall hear and deter-
mine the appeal or appeals, and set aside, alter or affirm the
award, correcting any error therein, and he may examine
parties and witnesses on oath, and, if he so pleases, inspect
the premises, requiring the attendance with him of the
engineer, and may order payment of costs by the parties,
or any of them, and fix the amount of such costs."

It appears to me the contention of Mr. Henderson is

Judgment. correct ; under the express words of the statute the Judge
Galt, C.J. is to *determine* the appeal ; and no appeal lies from this decision.

Motion refused with costs to be costs to the defendants in any event.

Thereafter the cause was tried at the Spring Sittings, 1893, of this Court at Ottawa, by FALCONBRIDGE, J.

It appeared that the plaintiff James York the elder, on or about the 20th day of October, 1888, as the owner of the west half of lot 28 in the 7th concession and of the north half of lot 27 in the 6th concession of the township of Osgoode, gave notice to the township clerk that he required to construct a ditch or drain through said lots, and found it necessary to continue the same through the land of the township, being road allowance and lots 26 or 27 in 6th concession of the township of Osgoode, under the Ditches and Watercourses Act, 1883, and requested that he would attend a friendly meeting on the road opposite lot 27 on the 6th day of November, 1888, at the hour of two p.m., with the object of agreeing, if possible, upon the respective portions of such ditch or drain to be made, deepened, or widened by the several parties interested. That on or about the 13th day of December, 1888, the plaintiff James York the elder gave notice to the clerk of the township of Osgoode, by way of requisition, according to the form C to the Ditches and Watercourses Act of 1883, that, as the owner of the west half of lot 28 in the 7th concession of the said township, he required to construct a ditch or drain through said lot, and it would be necessary to continue the ditch or drain through the following lands, namely, road allowance and lots numbers 26, 27, or 28 in the 6th concession of Osgoode, and having failed to agree upon the respective portions to be made by each, they required the engineer appointed by the municipality for the purpose to attend at the locality of said proposed ditch or drain on the 21st day of December, 1888, at the hour of 8 a.m., examine the premises, hear the parties and

their witnesses, and make his award under the provisions of the Ditches and Watercourses Act, 1883, which notice or requisition was signed by the said James York the elder, the said William Comrie, and the said William McRostie. Statement.

That on the 15th day of December, 1888, the council of the said township passed the following resolution: "That the application of James York and others requiring the township engineer to attend for the purpose of examining and laying out a ditch or drain across lots 26, 27, and 28, 6th concession be granted; that so soon as an engineer is appointed by this council, that the clerk notify him to attend in accordance with said application." That on the 8th day of July, 1889, a by-law was passed by the said council appointing Albert Helmer engineer for the township of Osgoode under the Ditches and Watercourses Act; that on the 18th day of August, 1890, the council of the said township passed the following resolution, "that the township engineer be authorized to report to this council in accordance with instructions heretofore given to him on the advisability of opening a ditch or drain under the Ditches and Watercourses Act, commencing on or about the side line between lots 27 and 28 in the 7th concession of the township of Osgoode, and running in a north-westerly direction until a proper outlet is reached, and that the clerk forward a copy of the same to the engineer." That on the 29th day of October, 1890, the said engineer made a report to the said council with profiles *re* James York ditch. That on the 22nd day of December, 1890, the said council passed the following resolution, "That the clerk notify Albert Helmer, township engineer, to take steps necessary for the purpose of making a proposed ditch, asked for by James York and others, between the 6th and 7th concessions, in accordance with plans placed before this council, and make his award accordingly." That the township engineer did nothing further in the matter, and on the 16th day of April, 1891, the resignation of the said Albert Helmer as township engineer was accepted, and a by-law was passed

Statement. appointing the defendant John Bower Lewis engineer for the township of Osgoode, under the Ditches and Watercourses Act, and on the 4th day of May, 1891, he accepted the appointment. The township clerk stated that he served the defendant Lewis with a copy of the resolution as to the original survey of Mr. Helmer, but that the defendant Lewis thought it would be better to file the requisition also, on account of so much time elapsing between the time of the passing of the resolution and his acting on it, and it would be safer to have a requisition also. It appeared also that the township clerk, having been applied to for the purpose of ascertaining whether there had been a resolution passed by the council, wrote the following letter: "This award was made on the requisition of George Comrie and others; consequently there was no resolution passed by the council in connection with it."

It appeared that upon receiving the requisition the defendant Lewis appointed the 4th day of September, 1891, at 8 a.m., went to the locality and, having heard the parties present, namely, George Comrie, William Comrie, James York, William McRostie, and James McCurdy, made his award. It also appeared that the notice in writing Form B, provided for by the 5th section of the Ditches and Watercourses Act, was served as therein required upon the plaintiff James York the elder, and that a meeting was held in pursuance thereof at which he, William McRostie, George Comrie, and Hugh McAlindon were present, and they not agreeing, he was asked to sign the requisition, but he refused. It did not appear that any notice in writing in the form D, or to the like effect, provided for by the 6th section of the said Act, was served as therein required. It appeared that on the 17th day of December, 1890, the plaintiff James York the elder conveyed to his son James York, the north half of lot No. 27 in the 6th concession of the said township, and to his son Isaac York the south half of lot No. 26 in the 6th concession of the said township, which conveyances were registered on the 3rd day of March, 1891; that these sons, who were unmarried men,

continued to live with their father as theretofore; that he was assessed for these lands in the year 1891 as theretofore; and these lands were worked with their father's land in the same manner as theretofore; and that apparently there had been no change of possession of these lands, nor was it the fact that these conveyances had been made known in the neighbourhood; that the father and both these sons knew beforehand of the time appointed by the defendant Lewis for his attendance, and the father and the son Isaac were both present when the defendant Lewis was laying out the ditch, and the son Isaac was assisting the defendant Lewis in laying it out. That neither the father nor either of the sons informed the defendant Lewis that the sons had become the owners of the lands so conveyed; that when the father appealed from the award both these sons were aware of his doing so, and the father and these two sons were present when the Judge of the County Court came upon the ground and when he heard evidence in respect of the appeal; that the notice of appeal given by the plaintiff James York the elder was on the following grounds: (1) That the award was contrary to law and evidence. (2) That the engineer had no jurisdiction to make the award. (3) That the owners and occupiers of the land affected were not notified of the time when and the place where the parties interested were to meet. (4) That the appellant was not notified of the time and place of meeting when the engineer attended to examine the premises in question. (5) No requisition describing the ditch or drain had been filed with the clerk of the municipality. (6) The assent in writing of a majority of the owners affected by or interested in the said alleged ditch had not been obtained thereto. (7) No resolution of the council approving of the scheme had been passed. (8) The appellant was not the owner of the lands on which the proportion of the proposed ditch to be constructed by him was calculated. (9) The proportion assigned to the appellant was unjust and inequitable, and it imposed on him a larger portion of work than the

Statement.

Statement. benefit he derived would warrant. (10) The course of the drain laid down in the alleged award was unjust to the appellant, in as far as the north half of lot No. 27 in the 6th concession was concerned. (11) The proceedings required by the Ditches and Watercourses Act had not been taken. (12) The award was unjust and inequitable, and had not been made in accordance with the Ditches and Watercourses Act. (13) The costs of the engineer were excessive and were not proportionately assigned to the interested parties according to the benefit to be derived.

It appeared that it was not till this action was brought that anything was said by the father or the two sons about the said conveyances from the father to them. It appeared that the defendant William Comrie was the patentee of the Crown of the west half of lot No. 27 in the 7th concession of the said township; that about six years before the trial of this action he put his son, the defendant George Comrie, into the sole possession of the south half of the said west half, telling him that he would give it to him, and to go in and make whatever use he wanted to of the place; that the defendant George Comrie had ever since enjoyed the fruits of it for his own use, and had paid the taxes upon it, and his father had not since that time interfered with his use of it. The defendant William Comrie was examined as a witness and said that he had given the south half of the said west half of lot 27 in the 7th concession of the said township to his son, the defendant George Comrie, about six years before the trial; that since that he had nothing whatever to do with it; that he was prepared to give him a deed for it whenever he wished; that his son had put up a barn upon it about two years before the trial, and had put up a dwelling house upon it and had got married and moved into it a year ago before last Christmas; that his son had put buildings on it worth from \$1,000 to \$1,200; and he certainly would not wrong him in it.

The learned Judge gave the following judgment:—

May 12, 1893. FALCONBRIDGE, J.:—

Judgment.
Falconbridge,
J.

In this case I follow the considered judgment of Sir Thomas Galt, C. J., on the motion to continue the injunction, and hold that the rights of the parties were concluded by the finding of the learned County Judge on the appeal.

The father did appeal, and the sons were in substance parties and are also bound.

The action will be dismissed with costs.

On the question of a trial Judge holding a question of law to have been disposed of by the Judge who has heard a motion for injunction, I refer to the expressions of Van-koughnet, C., in *Weir v. Mathieson*, 11 Gr. at p. 390, *sub fin.* See also *McGee v. Kane*, 14 O. R. 226.

At the Easter Sittings of the Divisional Court, 1893, the plaintiffs moved to set aside this judgment, and to enter judgment for the plaintiffs for a declaration that the alleged award was not binding on the plaintiffs or on their lands, and for an injunction against the defendants trespassing on the plaintiffs' lands, and against the making or letting of the work under the said award, or that a new trial might be granted, on the following amongst other grounds:—

(1) That the defendant engineer had no jurisdiction to make the alleged award, the majority of owners affected or interested not having assented thereto, and the promoter of the scheme not being an owner of any land benefited or mentioned in the award. (2) That the engineer having determined that only two persons (both defendants) were benefited by the drain, he had no jurisdiction to impose on the plaintiffs and their lands the burden of making the greater part of it. (3) That no notice of the proposed proceedings was given to the plaintiffs or to any of them, (4) That the alleged award orders the construction of ditches (not mentioned in the requisition) and the deepening and widening of ditches already made (not mentioned in the requisition) and purports to assess the plaintiffs and

Statement. their lands for the cost of the same. (5) That the alleged award is too indefinite, as the drain to be constructed between stakes A and B across the south half of lot 28 in the sixth concession is left to the will of the owner. as is the drain between stakes 8 and 11. (6) That the defendants trespassed on the plaintiffs' lands and threatened to continue to do so on the 28th day of October, 1892, although the engineer had no authority to inspect the ditch or let the work at that time. (7) That the learned Judge was wrong in accepting as final the interlocutory judgment of his Lordship Chief Justice Galt, and in holding that the judgment of the County Court Judge determined the question as to the validity of the alleged award.

On the 26th May, 1893, the motion was argued before ARMOUR, C. J., and STREET, J.

Aylesworth, Q. C. (with him *D. B. MacTavish*, Q. C.), for the plaintiffs. We contend that, without jurisdiction to make an award, one has been made which is void. The proposition to make the ditch was solely in the interest of two land-owners, while it involved crossing the lands of a dozen. There was no jurisdiction to start upon the enterprise at all. This Court should not abrogate its powers. It has inherent jurisdiction. We bring trespass, the defendants justify under the award, and the Court must determine the validity or invalidity of the award. The award does not find that the plaintiffs will be benefited by the proposed drain. If people are not *found* to be benefited, they cannot be made to pay : secs. 4, 5, and 6 of the Ditches and Watercourses Act, R. S. O. ch. 220, as amended by 52 Vic. ch. 49. The engineer finds only lot 27 in the 7th concession and half of 28 in the 6th to be benefited. The defendant George Comrie was not an owner, and he was the requisitioner under sec. 6. The assenting owners were not a majority of the owners under sub-sec. (a) of sec. 6. Six out of twelve cannot impose upon the other six the right to cross their lands, and the

burden of doing part of the work. No proper notice was given; the statute is very careful to require written notice: 52 Vic. ch. 49, sec. 2 (O.). No formal notice was given at all. The award is not sufficiently definite under sec. 8 of R. S. O. ch. 220. I refer to *Dawson v. Murray*, 29 U. C. R. 464; *Murray v. Dawson*, 17 C. P. 588; 19 C. P. 314; *Berkeley v. Elderkin*, 1 E. & B. 805. The question of jurisdiction could not be raised before the County Judge: *Re Anderson and Colchester*, 21 O. R. 476; *Hepburn v. Orford*, 19 O. R. 585; *O'Byrne v. Campbell*, 15 O. R. 339; *Regina v. Malcolm*, 2 O. R. 511. The notice given by the engineer as to the letting of the work, after the expiry of a year from the County Judge's order, is sufficient to give the plaintiffs a right of action.

G. F. Henderson, for the defendants. The County Judge had jurisdiction, and his determination is final and conclusive: *Murray v. Dawson*, 17 C. P. 588; *Short v. Parmer*, 24 U. C. R. 633; *Re Cameron and Kerr*, 25 U. C. R. 533; *Re Roberts and Holland*, 5 P. R. 346; *Vestry of St. Pancras v. Batterbury*, 2 C. B. N. S. 477; *Great Northern S.S. Fishing Co. v. Edgehill*, 11 Q. B. D. 225; *Regina v. County Court Judge of Essex*, 18 Q. B. D. 704. The evidence of waiver is undoubted; the absence of preliminaries may be waived: *Moore v. Gamgee*, 25 Q. B. D. 244. All the questions now raised were raised before the County Judge. The defendant Lewis, the engineer, should have received notice of action.

Aylesworth, in reply. Notice of action is not necessary where the claim is not for damages; the question, at all events, is not raised in the pleadings. It is not necessary, nor do the plaintiffs desire, to review the decision of the County Judge.

June 10, 1893. The judgment of the Court was delivered by

ARMOUR, C. J.:—

The decision of this case rests mainly upon the question whether the engineer had jurisdiction to make the award.

Judgment. If he had no jurisdiction to make it, the affirmance of it by the County Judge could not remedy the defect, for if he had no jurisdiction to make it, it was void, and the affirmance of it by the County Judge could not give it validity.

To hold that it could, would be to determine that the validity of the award of an engineer which was made by him without jurisdiction, would depend upon whether it was appealed from to the County Judge or not.

If not appealed from, it would be invalid; if appealed from it would be valid.

We are, no doubt, bound by the decision in *Murray v. Dawson*, 17 C. P. 588; but there is nothing in that decision which determines that, where there is no jurisdiction to make the award, the affirmance of it by the County Court Judge precludes this Court from entertaining the objection, or that such an objection is for the determination of the County Court Judge alone.

We think, therefore, that the question as to whether the engineer had jurisdiction to make this award was clearly open to the plaintiffs to raise in this suit.

Whether the engineer had jurisdiction to make the award in question depended upon whether, before filing the requisition, the owner filing it had obtained the assent in writing thereto of, including himself, a majority of the owners affected or interested; if he had not obtained such assent, the engineer had no jurisdiction, for it is clear that no such resolution was passed by the council as is provided for by sec. 6 (b) of the Ditches and Watercourses Act. But if the owner filing the requisition had obtained such consent in writing, the engineer was, immediately upon such filing, clothed with jurisdiction; and the absence of the notice in writing (Form D) required by the 6th section to be given, not by the engineer, but by the owner filing the requisition, would not deprive him of such jurisdiction, but would form only a ground of appeal against his award.

The question, therefore, is reduced to this:—Did the owner filing the requisition first obtain the assent in writing thereto of, including himself, a majority of the owners affected or interested?

Now, the owners affected or interested were George Comrie, who filed the requisition, William Comrie, James York (and James York the younger and Isaac York, if they are to be counted) George Popham, William McRostie, Hugh McAlindon, John Carson, James McCurdy, Mrs. Peter McRostie, and the corporation of the township of Osgoode—twelve in all. Judgment.
Armour, C.J.

Of these, six signed the requisition, namely, George Comrie, William Comrie, George Popham, William McRostie, Hugh McAlindon, and James McCurdy; and I think that the resolutions passed by the council of the corporation of the township of Osgoode, above set out, shew a sufficient assent on the part of that corporation to satisfy the statute.

It is not disputed that all those who signed the requisition, with the exception of George Comrie, were owners; but as to him the contention is that he was not an owner, and so the assent in writing of a majority of the owners affected or interested was not obtained.

It thus becomes material to ascertain what is meant by the term "owner" as used in the Ditches and Water-courses Act.

The term "owner" has no definite legal meaning, and has been construed differently in different Acts of Parliament in which it has been used, and has been so construed to meet the intention of the legislature as gathered from the particular Act in which the term has been used.

In Stroud's Judicial Dictionary it is said that "the owner of a property is the person in whom (with his or her assent) it is for the time being beneficially vested, and who has the occupation, or control, or usufruct of it;" and numerous cases are referred to as shewing the meaning attached to the term under various Acts of Parliament. See particularly *Lewis v. Arnold*, L. R. 10 Q. B. 245; *Woodard v. Billericay Highway Board*, 11 Ch. D. 214.

There are several cases in our own Courts where the meaning of the term has been discussed, as in *Conway v. Canadian Pacific Railway Co.*, 7 O. R. 673; *Hopkins v.*

Judgment. *Provincial Insurance Co.*, 18 C. P. 74; *Lyon v. Stadacona Armour, C. J. Insurance Co.*, 44 U. C. R. 472.

The defendant George Comrie was at least a tenant at will, and as such was an owner affected or interested within the meaning of the Act, and was making himself liable as such for the proportion of the work he might be awarded to perform.

I think, moreover, that the meaning to be ascribed to the term "owner" in this Act is, the assessed owner, the person appearing by the assessment roll to be the owner; for it never could have been intended that in a proceeding such as this, under this Act, there should be an inquiry as to the title of the apparent owners of the lands affected by the proposed work, and that a proceeding such as this should be set at naught by the appearance after the whole proceeding was at an end of persons who were not assessed claiming to be persons affected or interested by or in the work awarded to be done. And I do not think that James York the younger and Isaac York ought to be reckoned as owners within the meaning of the Act; for they were not assessed, but their father was, for the lands he had conveyed to them, at the time this award was made.

Unless this meaning is to be given to the term "owner" as used in this Act, I do not see how the provisions of the Act, sec. 9, sub-sec. 2, and of secs. 14 and 18, could be carried out.

I am of opinion, however, that whether the term "owner" means the assessed owner or not, George Comrie was an owner within the meaning of the Act.

Whether the plaintiffs were benefited by the proposed work was a matter to be determined by the engineer, and was the subject of appeal to the County Court Judge under the Act, and his decision as to matters over which the engineer had jurisdiction cannot be reviewed by us.

The award is, in my opinion, sufficiently definite, and sufficiently complies with the provisions of sec. 8 of the Act; and under the amended award the privilege granted to the plaintiff James York the elder by the award of

the engineer as to the digging of the ditch from stake 8 to stake 11 is, in my opinion, abrogated. Judgment.
Armour, C.J.

It was contended that, under any circumstances, the plaintiffs were entitled to maintain this action, because the engineer gave notice on the 28th day of October, 1892, within a year from the affirmance of the award by the County Court Judge, that he would let the work which by the amended award was to be done by the plaintiff James York the elder, and such letting would take place on the 3rd day of November, 1892, which was after the expiry of a year from such affirmance; but we do not think the mere publication of this notice within the year afforded any ground for such an action as this.

The motion will be dismissed with costs.

[QUEEN'S BENCH DIVISION.]

TURNER V. BURNS ET UX.

Restraint of Trade—Covenant—Construction of—Reasonableness—Certainty—Damages for Breach—Evidence—New Trial—Refusal of Judge to Submit Question to Jury—Non-direction.

The male defendant sold his business of a wholesale and retail confectioner to the plaintiff, and covenanted that he would not during a limited period, either by himself alone or jointly with or as agent for any other person, carry on or be employed in carrying on the business of a retail confectioner in the same city, which should in any way interfere with the business sold to the plaintiff, and that he would, to the utmost of his power, endeavour to promote the interest of the plaintiff amongst his (the defendant's) customers. This defendant had carried on his wholesale business in the basement of his premises, and his retail business in the shop above, of which latter his wife, the other defendant, had the management. The business carried on in the shop included the sale of cakes, candy, etc., and the serving of lunches. In the sale to the plaintiff were included an assignment of the lease of these premises and all the chattels and fixtures, as well as those used in the serving of lunches as in other ways. During the period limited by the covenant, and while the plaintiff was carrying on the business in the same way as the male defendant had previously carried it on and upon the same premises, the defendants began a precisely similar business in a shop in the same street, the shop being leased and the retail business carried on in the name of the wife, and that branch of the business conducted by her as theretofore, while the husband carried on the wholesale business in the basement. The jury found that the retail business was in fact that of the husband:—

Held, that the serving of lunches was part of the business of a retail confectioner according to the meaning to be ascribed to those words in the covenant.

2. That the covenant was reasonable and sufficiently certain to be enforced by the Court.
3. That general loss of custom after the commencement of the new business by the defendants could be shewn by the plaintiff as evidence to go to the jury of damages resulting to him from such business.

Ratchliffe v. Evans, [1892] 2 Q. B. 524, applied and followed.

4. That damages were properly assessed up to the date of the judgment.

Stalker v. Dunwich, 15 O. R. 342, followed.

5. It is no ground for a new trial that the Judge refused to submit any particular question to the jury, but if the Judge refuses to charge the jury in respect to the subject matter of any question which counsel desire to have submitted, it may be made the subject of a motion for a new trial for non-direction.

Statement.

THIS was an action brought by Isaiah E. Turner against Thomas Burns and his wife Mary Burns.

The statement of claim alleged that prior to the negotiations for and the execution of the agreement hereinafter referred to, the defendant Thomas Burns had been carry-

ing on at No. 108 Sparks street, in the city of Ottawa, the business of a retail confectioner, in which he was assisted by the defendant Mary Burns who managed the shop and the sales in the shop to customers; that the plaintiff entered into negotiations with the defendants for the purchase of such business, and on the 13th July, 1891, entered into an agreement with the defendant Thomas Burns, which was reduced to writing and executed on that day, and which provided as follows:—

Burns agreed to assign to Turner all his right, title, and interest in his lease of the premises No. 108 Sparks street.

Burns agreed to sell and Turner to purchase all the goods and chattels and fixtures mentioned in an inventory annexed at prices specified.

Burns agreed to sell and Turner to purchase all the stock in trade of boxes, fancy goods, confectionery, cakes, candy, etc., which should, on the 1st August, 1891, be in or upon the premises, at invoiced prices, etc.

Possession of the premises, goods, chattels, fixtures, and stock in trade was to be given to Turner on the 1st August, 1891, and Burns was to pay the price on that day and to assign the lease, etc.

“And the said Burns promises and agrees that he shall not nor will at any time or times during the period between 1st August, 1891, and 1st February, 1894, either by himself alone, or jointly with or as agent, journeyman, or assistant for any person or persons whatsoever, either directly or indirectly, or upon any account or pretence whatsoever, set up, exercise, or carry on, or be employed in carrying on, the trade or business of a retail confectioner in the said city of Ottawa, which shall in any material way interfere with the business so agreed to be conveyed to the said Turner, but shall and will, to the utmost of his power, endeavour to promote the interest of the said Turner amongst the customers of the said Burns and otherwise.”

The statement of claim further alleged that the defendant Mary Burns was aware of the agreement and assented

Statement. to it; that upon the 1st August, 1891, the plaintiff took over the stock of goods mentioned in the agreement, and entered into possession of the premises and commenced business therein as a retail confectioner, paid the price agreed upon and in all respects performed his part of the agreement; that the defendants then left Ottawa and went to Detroit, where they set up a similar business and carried it on in the name of the defendant Thomas Burns, the defendant Mary Burns assisting him in such business; that the defendants, some time afterwards, left Detroit and returned to Ottawa, and on or about the 1st October, 1892, in disregard of the covenant in the agreement, the defendant Thomas Burns commenced to carry on business as a retail confectioner at No. 78 Sparks street, in the city of Ottawa; that such business was nominally carried on in the name of the defendant Mary Burns, but was really and in truth the business of the defendant Thomas Burns; that the defendant Thomas Burns pretended that he was carrying on the business of a wholesale confectioner, and that the business of a retail confectioner was carried on by his wife, but the fact was that such pretence was only colourable, and the name of the wife was used as an endeavour fraudulently to injure the plaintiff in his business and to avoid the agreement.

And the plaintiff claimed: (1) A declaration that the business carried on at No. 78 Sparks street was in fact the business of the defendant Thomas Burns. (2) An injunction restraining the defendants from carrying on such business. (3) That if it should appear that the defendant Mary Burns was entitled to carry on the business, the defendant Thomas Burns should be restrained from in any way assisting or aiding the defendant Mary Burns in carrying on such business. (4) That if it should appear that the business so carried on was the business of the defendant Mary Burns, it should be declared that she was bound by the terms of the agreement, and, having assented thereto, was now estopped from carrying on any such business in breach thereof. (5) Damages for breach of the agreement.

The defendant Thomas Burns by his statement of defence denied that he was, or had been since the 1st August, 1891, either by himself alone or jointly with or as agent, journeyman, or assistant, carrying on or employed in carrying on the business of a retail confectioner in Ottawa, and alleged that the covenant and agreement relied on by the plaintiff were void for uncertainty, and illegal and insufficient in law, and without consideration.

The defendant Mary Burns denied all the allegations in the statement of claim, and said that the business at No. 78 Sparks street was her own separate business and property, and was carried on by her for her own separate use and benefit.

Issue.

The action was tried at the Spring Sittings of this Court, 1893, at Ottawa, by FALCONBRIDGE, J., and a jury.

It appeared that prior to entering into the agreement in the pleadings mentioned, the defendant Thomas Burns was carrying on business at 108 Sparks street, and the manner in which the business was carried on was as follows: he personally superintended the baking and manufacturing, which were carried on in the basement, and from it he sold goods by wholesale and supplied therefrom goods to his shop, which was on the ground floor, and which was personally superintended by his wife, the defendant Mary Burns, and in this shop he sold cakes, candies, ice cream, and soda water, and served lunches to customers; the business carried on in the basement he called the wholesale business, and that carried on in the shop he called the retail business. The plaintiff negotiated with the defendant Thomas Burns for the whole of his business so carried on at 108 Sparks street, and became the purchaser, and such purchase was carried out by the agreement in the pleadings mentioned.

The plaintiff, in pursuance of the agreement, entered into possession of the premises, 108 Sparks street, and carried on the same business and in the same manner as

Statement. the defendant Thomas Burns had theretofore carried it on, and continued to carry it on and was carrying it on in the same manner till the trial of this action.

After the plaintiff got possession under the terms of the agreement, the defendant Thomas Burns started a wholesale business such as he carried on at 108 Sparks street, on Bank street in Ottawa; but, it being unsuccessful, he went to Detroit in the month of October, 1891, and remained there until April, 1892, and while there carried on a similar business to that which he had carried on at 108 Sparks street, and in the same manner; he then returned to Ottawa, and raised by loan \$1,000, as he alleged, for his wife, on a property which he had conveyed to her on the 27th May, 1891, as she stated, for herself and her children, because she asked him to. A lease was then taken in the name of the defendant Mary Burns of No. 78 Sparks street, dated the 13th October, 1892, and on the 15th October, 1892, she sublet the basement to the defendant Thomas Burns; and thereafter the same business precisely as it had been previously carried on by the defendant Thomas Burns at 108 Sparks street, was carried on in the same manner at 78 Sparks street. The premises 78 Sparks street were on the same side of the street as the premises 108 Sparks street, and within a block of them.

General evidence was given by the plaintiff to shew loss of custom after the commencement of the business at 78 Sparks street, and evidence to shew that the business carried on at 78 Sparks street was really the business of the husband, and not that of the wife.

At the conclusion of the evidence, a discussion took place between the learned Judge and the counsel for both parties, Mr. O'Gara, the counsel for the defendant, contending that the questions to the jury should be specific, namely: (1) Was the business started by Mrs. Burns out of her own money? (2) Did she carry on the business as her own, separate from her husband? And (3) was the arrangement between her and her husband that she was to carry on her

own business separate from him? He also contended that the damages should not be assessed against her. Statement.

The learned Judge left the following questions to the jury, which they answered as follows:

1. Is the business which is carried on upstairs at No. 78 Sparks street in fact the business of the defendant Thomas Burns? A. Yes.

2. Has the defendant Thomas Burns been guilty of any breach of the covenant with reference to the trade or business of a retail confectioner in the city of Ottawa? A. Yes.

3. If so, what damages has the plaintiff suffered by reason of such breach of covenant up to the present day? A. \$40 per month.

4. What further damage will he suffer if the business is carried on as at present up to 1st February, 1894? A. Same rate as above, providing defendant continues in business.

The learned Judge thereupon directed judgment to be entered for the plaintiff for \$200 damages, with injunction against both defendants restraining them from any act contrary to the covenant in this agreement, the plaintiff to have full costs of whole action against the defendant Thomas Burns and full costs against both defendants from the time Mary Burns was added as a party.

At the Easter Sittings of the Divisional Court, 1893, the defendant Thomas Burns moved to set aside the findings of the jury and the judgment entered thereon, and to enter a judgment dismissing the action with costs as against the defendant Thomas Burns, or for a judgment of non-suit, or for a new trial, on the following grounds: (1) That the covenant relied on was void for uncertainty, and not capable of enforcement against any of the defendants. (2) That the findings of the jury were contrary to law, evidence, and the weight of evidence. (3) That there was no evidence to be submitted to the jury in support of the findings that the business carried on by the defendant

Statement.

Mary Burns at No. 78 Sparks street, in the city of Ottawa, was the business of the defendant Thomas Burns, or that the said business did materially affect the plaintiff, or entitle him to damages, or to an injunction against the said Thomas Burns. (4) That the learned Judge was wrong in instructing the jury that the business of giving lunches, catering, and selling bread, as carried on by the defendant Mary Burns, was a confectionery business, which, if carried on by her husband, might materially affect the confectionery business of the plaintiff. (5) That the learned Judge was also wrong in instructing the jury that the decline of the plaintiff's gross receipts for the months of October, November, and December, 1892, and January and February, 1893, as compared with the corresponding months of the prior years, was a criterion of damages in this action, there being no evidence of the net profits of the plaintiff's business at any time, or of the proportion which such net profits, if any, bore to the gross receipts, and such decline in the gross receipts being estimated on the whole business of the plaintiff, including the giving of lunches, catering, and of wholesale business, and not confined to the confectionery business proper, or that such decline was not due to other causes. (6) That the charge of the learned Judge was also wrong and misleading in this, that he instructed the jury that they might disregard the ownership of the house and premises granted by Thomas Burns to his wife in May, 1891, and also the evidence of both defendants as to the ownership of the business, and that if the carrying on of the business in the name of the said Mary Burns was collusive as against the plaintiff (without explaining the scope or meaning of that term as used by him) they might find the business to be that of Thomas Burns, whereas the learned Judge should have told the jury that the burden of proof was on the plaintiff to establish his case, and that the ownership of the house and premises was already that of Mary Burns, and that the evidence given by the defendants should be

accepted except where contradicted by the evidence of the plaintiff, or otherwise shown to be untrue. (7) And for non-direction in this, that the learned Judge did not instruct the jury as to the meaning of the covenant relied on, or what would constitute a breach of it, or as to the law of married women, and that the defendant Mary Burns was entitled to carry on business in her own name, and that if she was the lessee of the premises, and the money with which the business was carried on was hers, and that she carried on the business as her own and free from the control of her husband, they should find the business to be that of the defendant Mary Burns, even though they should find that she would not have carried it on if her husband was free from the alleged covenant. (8) That the learned Judge was wrong in refusing to submit to the jury the questions in the last paragraph mentioned requested in that behalf; especially in view of the want of instructions aforesaid, the jury were liable to accept the view of the plaintiff's counsel, as, in fact, they did, that what was the wife's was the husband's, and that the carrying on of the business at all in the wife's name was evidence of collusion. (9) That there was no evidence that the plaintiff suffered any material damages by reason of the business carried on by the said Mary Burns, nor were any data proved on which any such damages could be estimated, as is necessary to be done in actions for damages for breach of contract, nor should damages be allowed after the commencement of the action. (10) That the charge of his lordship was against carrying on the business absolutely, which was not warranted by the covenant or by the evidence. (11) That, in view of the fact that the defendant Thomas Burns was at the time carrying on a wholesale business in the cellar of the premises in question, an injunction should not be granted against his carrying on the business in any form.

Statement.

The defendant Mary Burns also moved to set aside the findings of the jury and the judgment for an injunction against the said Mary Burns, and to enter judgment dis-

Argument. missing the action with costs against the defendant Mary Burns, on the same grounds as those from (1) to (10) inclusive, on the motion of the defendant Thomas Burns; and on the ground: (11) That, in view of the fact that the defendant Mary Burns was at the time liable for the future rent of the premises, and to several creditors for the stock of the business then in hand, it was inequitable that an injunction should be granted against her carrying on the business in her own name.

The motions were argued before ARMOUR, C. J., and STREET, J., on the 17th May, 1893.

Moss, Q.C., (with him *D. B. MacTavish*, Q.C.,) for the defendants. There was no fraudulent scheme or arrangement between husband and wife: *Baby v. Ross*, 14 P. R. 440. The business was that of the wife, and she could legally have the assistance of her husband in carrying it on: *Dominion S. & I. Soc'y. v. Kilroy*, 14 O. R. 468; 15 A. R. 487; *Bird v. Lake*, 1 H. & M. 338. There is no evidence of sales of confectionery to customers of the plaintiff; all that is said is that the plaintiff lost lunch-customers after the business at 78 Sparks street was begun; lunches are not confectionery. The covenant is too vague to enforce: *Davies v. Davies*, 36 Ch. D. 359, 388, 394, 399. There is no proof of the actual damage suffered by the plaintiff. He shewed only what the falling off was in his gross receipts. The covenant should have contained a stipulation for liquidated damages. There was nothing shewn on which the jury could estimate the actual damage. On the question of the computation of damages, I refer to *Howard v. Taylor*, 90 Ala. 241; *Peltz v. Eichele*, 62 Missouri 171; *Allen v. Taylor*, 19 W. R. 35, 556. The wife is not a proper party.

Osler, Q. C., (with him *Dowdall*) for the plaintiff, referred to *Maxim-Nordenfelt Co. v. Nordenfelt*, 9 Times L. R. 150; *Mallan v. May*, 11 M. & W. 653; *Natural Provincial Bank v. Marshall*, 40 Ch. D. 112; Kerr on Injunctions, 2nd ed., pp. 299, 614.

Moss, in reply.

June 10, 1893. The judgment of the Court was delivered by

Judgment
Armour, C.J.

ARMOUR, C. J.—(after stating the facts):—

It does not appear from what took place at the close of the evidence that the learned Judge absolutely refused to submit to the jury the questions suggested by Mr. O'Gara, but that he thought that the general question submitted by him was a more concise method of getting the opinion of the jury on the real question at issue, which was whether the business carried on at No. 78 Sparks street was in fact the business of the wife or that of the husband, and the question so submitted comprehended within it the consideration by the jury of the questions suggested by Mr. O'Gara.

It is no ground, moreover, for a new trial that the Judge refused to submit any particular question to the jury or any question; but, if the Judge refuses to charge the jury in respect of the subject matter of any question which counsel desires to have submitted to the jury, it may be made the subject of a motion for a new trial on the ground of non-direction.

And it does not appear that the learned counsel asked the learned Judge to charge the jury in respect of the subject matter of the questions suggested by him, nor does it appear that the learned counsel asked the learned Judge to instruct the jury as to the meaning of the covenant relied on, or what would constitute a breach of it, or as to the law of married women.

As to the 4th ground taken in the notice of motion. It does not appear that the learned Judge charged the jury in the terms therein complained of, but I think the serving of lunches was part of the business of a retail confectioner according to the meaning to be ascribed to those words in the covenant relied on.

In order to construe this covenant we must consider the subject matter of the contract, what was being bought

Judgment. and sold, how the business was designated by the parties, and the business that was carried on under such designation, and the context of the instrument containing the covenant.

The subject matter of the contract was the whole business carried on by the defendant Thomas Burns at No. 108 Sparks street; what was being bought and sold was all the goods, chattels, and fixtures, as well those used in the serving of lunches as those used in other ways; the business carried on in the basement was designated by the defendant Thomas Burns, at all events, as the wholesale business, and that carried on in the shop was designated by him the retail business; the business carried on in the shop included the sale of cakes, candies, ice cream, soda water, and lunches; the business as it was carried on by the defendant Thomas Burns was purchased by the plaintiff, and we have the defendant by the agreement leaving himself free to carry on the business of a wholesale confectioner, but precluding himself from carrying on the business of a retail confectioner, so as "to interfere with the business so agreed to be conveyed to the said Turner."

If we were permitted to look at the evidence of the defendant Thomas Burns for the purpose of construing the covenant, it is quite clear that he was of the opinion that the serving of lunches was part of the business of a retail confectioner as carried on by him.

As to the fifth ground taken in the notice of motion. I do not think that the learned Judge was wrong in charging as he did as to the damages. I think that general loss of custom after the commencement of the business at 78 Sparks street could be shewn by the plaintiff as evidence to go to the jury of damages resulting to him from such business. I think that the principles laid down in the recent case of *Ratcliffe v. Evans*, [1892] 2 Q. B. 524, are equally applicable to this case as to that. In that case it is said (p. 532) that "in all actions on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circum-

stances under which these acts are done, must regulate the ^{Judgment.} degree of certainty and particularity with which the dam- ^{Armour, C.J.} age done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry." It is true that this is not an action on the case but an action on the covenant. That was an action for an untrue statement maliciously published about the plaintiff's business; this is for the wilful and intentional breach by the defendant Thomas Burns of his covenant to the injury of the plaintiff's business; the difficulty of proof of the injury is alike in both; and I think that as much certainty and particularity was observed in this case as was reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage was done: see *Chapman v. Kirby*, 49 Ill. 211.

As to the sixth ground taken in the notice of motion. I do not think that the charge is as stated therein, and I do not think that as delivered it was open to the objection therein taken.

As to the findings, I think that there was abundant evidence to go to the jury in support of them; that there was abundant evidence that the business carried on at 78 Sparks street was in truth the business of the defendant Thomas Burns, and that it materially interfered with the business conveyed by the defendant Thomas Burns to the plaintiff; and the finding of the jury as to the damages was in effect a finding that it did so materially interfere with it. And I think that the damages were properly assessed up to the date of the judgment: *Stalker v. Dunwich*, 15 O. R. 342.

The covenant relied on was limited as to time and space, and was reasonable, and is not, in my opinion, void for uncertainty.

Judgment. The defendant Thomas Burns was permitted by it to carry on the business of a retail confectioner within the limited time and space, but he was not permitted to carry it on so as in any material way to interfere with the business agreed to be conveyed to the plaintiff.

Whether he did so was capable of being shewn with certainty, and I think that the covenant was sufficiently certain to be capable of being enforced in this Court.

It was a widely different covenant in its terms from the covenant held void for uncertainty in *Davies v. Davies*, 36 Ch. D. 359.

I think that the judgment of the learned Judge should be varied by making the costs payable by the defendant Mary Burns payable out of her separate estate, and not otherwise, and that with this variation it should be affirmed and the motions dismissed with costs.

[QUEEN'S BENCH DIVISION.]

OLIVER V. McLAUGHLIN ET UX.

Fraudulent Conveyance—Action to Set Aside—Plaintiff not an Execution Creditor—Appropriate Relief—Demurrer to Relief Prayed—Rule 384—13 Eliz. ch. 5—Status of Plaintiff—Claim upon Implied Contract to pay Mortgage—Proof of Contract—Voluntary Conveyance—Fraudulent Intent.

1. Where a creditor brings his action to set aside as fraudulent a conveyance made by his debtor of his property, without first obtaining judgment and execution, he must sue on behalf of all the creditors of the debtor, and in such action his relief will be confined to setting aside the conveyance, leaving him to resort to some independent proceeding to obtain execution against the property comprised in such conveyance.
2. A demurrer to the relief prayed in respect of the cause of action, and not to the cause of action itself, will not now be allowed. Rule 384 referred to.
3. The protection of 13 Eliz. ch. 5 is not confined to creditors only, but extends to creditors and others who have lawful actions; and in this case, where, before the impeached conveyance was made, all the moneys secured by a mortgage, subject to which the plaintiff had conveyed the mortgaged lands to the fraudulent grantor, had fallen due, the plaintiff had at the time of the making of the conveyance a lawful action upon the implied contract of his vendee to pay the moneys secured by the mortgage; and this implied contract was sufficiently proved against the fraudulent grantee by proof of the mortgage and of the conveyance by the plaintiff to the fraudulent grantor subject to the mortgage.
4. Where a conveyance is voluntary, it is only necessary to shew fraudulent intent on the part of the grantor.

THE plaintiff by his statement of claim alleged : (1) That Statement.
by deed under the Act respecting Short Forms of Conveyances, dated the 21st February, 1889, he conveyed to the male defendant certain lands in the town of Essex, subject to a mortgage made by the plaintiff to one Brodie for \$500 and interest thereon, due and payable on the 3rd October, 1891, which mortgage the male defendant agreed to assume and pay off and to indemnify the plaintiff against all liability thereon, but the male defendant did not do so; and on the 27th October, 1892, the plaintiff obtained in this Division of the High Court a judgment for \$653 and costs against the male defendant, which still remained due and unpaid. (2) That on the 21st February, 1889, and up to the time of the conveyance thereafter mentioned, the male defendant was seized in fee of certain lands in

Statement. the township of Colchester North which were available for the payment of the debts of the male defendant, and he had no other property available for the payment thereof. (3) That by a conveyance dated the 30th October, 1891, and registered on the 9th November, 1891, the male defendant granted and conveyed to the female defendant these last mentioned lands. (4) That the female defendant was the wife of the male defendant. (5) That no consideration was given or paid by the female defendant to the male defendant for the conveyance, but it was made voluntarily for the purpose of fraudulently protecting the lands from the claim of the plaintiff and the other creditors of the male defendant, and would have the effect of preventing the plaintiff and the other creditors of the male defendant from realizing their claims against him, and was so made with the full intent on the part of the defendants to defraud the plaintiff and the other creditors, and to defeat, delay, and hinder them from obtaining payment of their claims.

And the plaintiff claimed: (1) That the conveyance from the male to the female defendant might be set aside and declared null and void as against the plaintiff and the other creditors of the male defendant. (2) That the land therein described might be sold and the proceeds applied in payment of the amounts justly due to the plaintiff and the other creditors of the male defendant. (3) And such further relief as to the Court might seem meet.

The male defendant by his statement of defence: (1) Denied the allegations in the statement of claim. (2) Specially denied that the alleged conveyance was made for the purpose of fraudulently protecting the lands from the claims of the plaintiff or others. (3) Denied that he ever made any conveyance or the conveyance mentioned with the intent of defrauding the plaintiff or others, or of defeating, delaying, or hindering him or them, and denied that the conveyance in question had such effect. (4) Alleged that at the date of the alleged conveyance he owned other lands than those mentioned in such convey-

ance free of incumbrances, and other real and personal property sufficient to satisfy all claims against him, and still owned a great part thereof. (5) Alleged that the plaintiff was not, at the date of such conveyance, a creditor of his, and had no legal claim whatever against him. (6) Denied that such conveyance was a voluntary conveyance, and said that, if made, it was made for good and valuable consideration. (7) Alleged that the plaintiff induced him to purchase the lands in the town of Essex by fraudulent misrepresentations as to the value thereof made for the purpose of inducing him to purchase the same, and that he had in consequence of such misrepresentations suffered great loss and damage, and he claimed the same from the plaintiff and the right to set off the same against the alleged judgment. (8) Claimed the right at the trial to still further demur to other portions of the statement of claim. Statement.

The male defendant also demurred to so much of the statement of claim as claimed that the lands should be sold and the proceeds applied in payment of the amounts justly due to the plaintiff and other creditors, on the ground that the plaintiff had not alleged such facts as shewed that he or any other creditors on behalf of whom he sued had any lien, either legal or equitable, upon the lands, and upon other grounds sufficient in law.

The female defendant also delivered a statement of defence, in which she repeated most of the allegations made by her co-defendant, and also alleged that, at the date of the conveyance to her, she had no knowledge that her co-defendant was indebted to the plaintiff in any sum whatever, or that he was bound to indemnify him as alleged. She also demurred on the same grounds as her co-defendant.

The plaintiff joined issue upon these defences, and, in reply to the 7th paragraph of the defence of the male defendant, said that the matter therein alleged was pleaded by that defendant in his defence in a former action in this Court wherein this plaintiff was plaintiff and that defendant was defendant, and wherein judgment was given for

Statement. the plaintiff, which action was that referred to in the 1st paragraph of the statement of claim, and the matter thereof was *res judicata* and the male defendant was estopped from pleading the same.

The action was tried at the Spring Sittings, 1893, of this Court at Sandwich by STREET, J.

It appeared that the plaintiff, on the 3rd October, 1888, by indenture of mortgage of that date conveyed the lands in the town of Essex to one Brodie, for securing the sum of \$500, payable on the 3rd October, 1891, with interest thereon annually at the rate of eight per centum per annum. That on the 21st February, 1889, the plaintiff by indenture of bargain and sale of that date, for the consideration of \$500, conveyed the said lands to the male defendant subject to the said mortgage. That thereafter the male defendant paid some money on account of the interest payable by the said mortgage. That the principal, with some arrears of interest, having fallen due upon the said mortgage, and the plaintiff, being pressed by Brodie for payment, had several conversations with the male defendant in which he urged him to pay off the mortgage, and on the 19th October, 1891, the plaintiff's solicitors, by the plaintiff's instructions, wrote to the male defendant that they were instructed by the plaintiff to take proceedings to compel him to pay the mortgage. That on the 30th day of October, 1891, the plaintiff was served with a writ of summons by Brodie to recover the amount due upon the said mortgage by virtue of the covenant therein, and on that day wrote two letters to the male defendant, one of which he sent by post and one by special messenger, informing him that he had been served with the said writ, and urging to come and settle the mortgage at once. That by indenture of bargain and sale dated the 30th day of October, 1891, and registered on the 9th day of November, 1891, the male defendant, for the expressed consideration of \$500, conveyed to the female defendant the north-west quarter of lot 24 on the south

side of the Malden Road, in the township of Colchester North, said to be worth \$2,500, or \$2,600. That Brodie obtained judgment against the plaintiff on his covenant contained in the mortgage for the amount of the principal money and interest due thereon. That on the 4th day of March, 1892, the plaintiff brought an action against the male defendant to compel payment by him of the said mortgage money, and judgment was recovered therein on the 11th day of November, 1892, by the plaintiff against the male defendant for the sum of \$653, and costs to be taxed. That this action was commenced on the 11th day of February, 1892. That the female defendant was not aware that the conveyance of the said land had been made to her till, as she said, it was given to her by her husband after it was registered. Statement.

The learned Judge held on the evidence there was no consideration for the conveyance from the husband to the wife, that it was a voluntary conveyance, and was fraudulent and void as against creditors; and gave judgment declaring that the said conveyance was voluntary and was fraudulent and void as against the plaintiff and the other creditors of the defendant Thomas McLaughlin, and should be set aside; and ordered and adjudged accordingly, with full costs of the action, including the costs of the demurrer; with reference to the Deputy Clerk of the Crown at Sandwich to take the usual accounts and make the usual inquiries, and if the amount found due to the plaintiff and the other creditors and costs of suit should not be paid within one year from the report, the property in question should be sold to realize the same, with the costs of sale.

At the Easter Sitzings of the Divisional Court, 1893, the defendants moved to reverse and set aside the said judgment and to enter judgment for the defendants, dismissing the plaintiff's action with costs and allowing the demurrer of the defendants with costs, upon the ground that the said judgment was contrary to law, evidence, and the weight of evidence, and that, upon the facts given in evi-

Statement. dence upon the trial, the judgment should have been in favour of the defendants, and more particularly upon the following grounds:—

1. That the plaintiff was a creditor of the defendant Thomas McLaughlin by reason only of a judgment by consent obtained nearly a year subsequent to the execution and delivery of the impeached conveyance, and the plaintiff was therefore in the position of a subsequent creditor, and, there being no sufficient evidence of any intent to defeat his claim nor any pre-existing debts unpaid, was not in a position to maintain this action.

2. That if there was a pre-existing liability on the part of the defendant Thomas McLaughlin to the plaintiff, it was by reason only of an alleged right to indemnity in respect of moneys secured by mortgage, and it was not shewn in evidence by how much, if at all, the amount secured exceeded the value of the security, and the plaintiff was not therefore at the date of the impeached conveyance a creditor of the defendant within the meaning of this Act.

3. That as against the defendant Hannah Caroline McLaughlin the plaintiff did not prove himself a creditor of Thomas McLaughlin, inasmuch as Hannah Caroline McLaughlin was a stranger to the action by which the plaintiff recovered judgment against the defendant Thomas McLaughlin, and the exemplification of judgment and pleadings in the said action could not be used against the defendant Hannah Caroline McLaughlin as evidence of a debt.

4. That the plaintiff was not necessarily delayed, hindered, or defeated in obtaining payment of his debt, if any, by the impeached conveyance, because the defendant Thomas McLaughlin had at the time this conveyance was executed other property more than sufficient to pay all liabilities, including the plaintiff's; and because default had been made in respect of the mortgage more than a year prior to the execution of the conveyance attacked, and more than two years before the said judgment was ob-

tained, and no effort was made during that time to enforce performance of the obligation, if any, to pay the mortgage money. Statement.

5. That valuable consideration had been given and was proved for this conveyance from the defendant Thomas McLaughlin to Hannah Caroline McLaughlin, and no fraud was shewn on the part of either of the defendants, and certainly none on the part of the defendant Hannah Caroline McLaughlin.

6. The plaintiff did not allege nor prove that he or any other creditor was an execution creditor of the defendant Thomas McLaughlin, and there was no evidence of actual fraud, and the plaintiff was therefore not in a position to maintain this action.

7. The judgment was in any case wrong in directing a sale of the said land without regard to the right of the defendant Hannah Caroline McLaughlin to dower therein, as if the conveyance is set aside she is entitled to obtain dower in the said lands in priority to any claim of the plaintiff thereto.

8. And on the argument of this motion the defendants will contend that, no actual fraud having been shewn, the defendant Thomas McLaughlin was not a proper party to the action, and that the action should, therefore, have been dismissed as against him with costs. And also that the plaintiff not having alleged in his statement of claim that he was an execution creditor of the defendant Thomas McLaughlin, the demurrer of the defendants to so much of the plaintiff's statement of claim as asked for equitable execution should have been allowed with costs; and the defendants will ask upon the foregoing, among other grounds, and upon the evidence, that the plaintiff's action be dismissed with costs, and the judgment, in so far as it directs a sale of the property described in the impeached conveyance, be varied by refusing the prayer for equitable execution; or for such other judgment as to the Court may seem right; and for payment by the plaintiff to the defendants of the costs of the action, including the costs of the motion.

Argument

The motion was argued before ARMOUR, C. J., and F'ALCONBRIDGE, J., on the 25th of May, 1893.

Aylesworth, Q. C., for the defendants. The judgment of the trial Judge sets aside the conveyance. He inferred that there was an actual intent to defraud. I submit that was not a proper inference to draw from the evidence. No intention existed to defeat this claim. The male defendant considered the plaintiff's threat was not serious. He was not under any contract to pay off the mortgage; he had merely bought the plaintiff's equity of redemption. Even if it was a voluntary conveyance, he was in a position to make a voluntary settlement at the time he conveyed to his wife. At this time the plaintiff was not in a position to set the conveyance aside. His claim was not a debt; it was merely a right to sue to compel the male defendant to discharge the mortgage debt. The plaintiff is in fact a subsequent creditor and has no status: *Masuret v. Mitchell*, 26 Gr. 435; *Clark v. Hamilton Provident and Loan Society*, 9 O. R. 177. The plaintiff did not shew that the land was insufficient to pay the mortgage. No attempt was made to sell the land. The case is within the principle of *Ex p. Mercer*, 17 Q. B. D. 290; *Real Estate Loan Co. v. Yorkville and Vaughan Road Co.*, 9 O. R. 464; *Cameron v. Cusack*, 17 A. R. 489; *Darling v. Price*, 27 Gr. 331; *Struthers v. Glennie*, 14 O. R. 726. If the conveyance was not a purely voluntary one, the intent of the wife must be shewn. She had no knowledge of this claim of the plaintiff; the most that can be said is that she knew her husband had bought a mortgaged property. The decree goes too far at any rate, for when the plaintiff began this action he was not an execution creditor, and he cannot, therefore, have equitable execution: *McCall v. McDonald*, 13 S. C. R. 247; *Longeway v. Mitchell*, 17 Gr. 190. Finally, if the judgment stands, the wife's rights as dowress should be preserved.

W. H. Blake, for the plaintiff. The form of the decree is right; a simple contract creditor can bring the action, as decided in *Longeway v. Mitchell*, 17 Gr. 190. As to the

facts, the findings of the learned Judge should stand. He Argument.
heard the evidence of the defendants, and did not believe
it. As to the status of the plaintiff, I refer to *Allen v.*
Furness, 20 A. R. 34; *Boyd v. Robinson*, 20 O. R. 404;
May on *Fraudulent Conveyances*, 2nd ed., p. 166.
Aylesworth, in reply.

June 26, 1893. The judgment of the Court was delivered by

ARMOUR, C. J.—(after setting out the facts):—

It seems to be well settled that where a creditor brings his action to set aside a fraudulent conveyance made by his debtor of his property without first obtaining judgment and execution against his debtor, he must sue on behalf of all the creditors of his debtor, and in such case his relief in such action will be confined to setting aside the fraudulent conveyance, leaving him to take some independent proceedings if he wishes to have execution against the property so fraudulently conveyed: *Reese River Silver Mining Co. v. Atwell*, L. R. 7 Eq. 347; *Longeway v. Mitchell*, 17 Gr. 190; *McCall v. McDonald*, 13 S. C. R. 247.

The plaintiff in this case brought his action to set aside as fraudulent the conveyance of the land made by the male defendant to the female defendant without first obtaining judgment and execution against the male defendant, and rightly brought it on behalf of all the creditors of the male defendant; but the only relief he can obtain is the setting aside the said conveyance, and he must resort to the judgment he has since obtained, and to execution to be issued thereon, to realize out of the said land his judgment debt and costs.

The judgment, therefore, of my learned brother must be varied by confining it to the setting aside the fraudulent conveyance of the land made by the male to the female defendant.

The demurrer in this case would have been successful

Judgment. under the system of special pleading which flourished in the Court of Chancery before the Judicature Act came into force : *Abbott v. Canada Central R. W. Co.*, 24 Gr. 579.
Armour, C.J.

But since the Judicature Act came into force, such a demurrer is no longer allowable, for it is not a demurrer to the cause of action, but only to the relief prayed in respect of the cause of action, and the demurrer in this case was therefore properly overruled : Con. Rule 384.

The protection of the statute 13 Eliz. ch. 5 is not confined to creditors only, but extends to creditors and others who have lawful actions, etc.

And upon the conveyance by the plaintiff to the male defendant of the land subject to the mortgage to Brodie there arose in favour of the plaintiff an implied contract on the part of the male defendant to pay the moneys secured by the said mortgage as they respectively fell due : *Beatty v. Fitzsimmons*, 23 O. R. 245.

And all the moneys secured by the said mortgage having fallen due before the making of the conveyance by the male to the female defendant, the plaintiff had at the time of the making thereof a lawful action against the male defendant upon his said implied contract, and was by reason thereof entitled to maintain this action to set aside the said conveyance, as devised and contrived to delay, hinder, and defraud him of his said lawful action.

This implied contract was sufficiently proved against the female defendant by the proof made at the trial of the mortgage to Brodie and the conveyance by the plaintiff of the land so mortgaged to the male defendant, subject to the said mortgage.

If it was necessary for the plaintiff, in the circumstances of this case, to shew that the land mortgaged to Brodie was insufficient in value to satisfy the said mortgage, it was, in our opinion, abundantly shewn out of the mouth of the male defendant.

That the conveyance from the male to the female defendant was devised and contrived by the male defendant with the intent of defrauding the plaintiff of his lawful action, there can, upon the evidence, be no doubt.

Nor can there, upon the evidence, be any doubt that it was a voluntary conveyance, and that the pretended consideration was trumped up after the making of the conveyance in the vain effort to support it. Judgment.
Armour, C.J.

The learned Judge has found that it was entirely voluntary and was made by the male defendant for the purpose of defrauding the plaintiff.

It is only where a conveyance is made upon good consideration that it is necessary under the statute in order to set it aside to shew the fraudulent intent of both parties to it. But where a conveyance is voluntary, it is only necessary to shew the fraudulent intent of the maker of it.

The judgment will, therefore, be that the conveyance from the male to the female defendant is fraudulent and void as against the plaintiff and the other creditors of the male defendant, and that, as against the plaintiff and such other creditors, it be set aside with costs, including the costs of the demurrer, and that this motion be dismissed with costs.

[COMMON PLEAS DIVISION.]

REGINA v. MCGARRY.

Intoxicating Liquors—Sale of Liquor—R. S. O. ch. 194, sec. 131—Search Warrant—Sufficiency of Place to be Searched, and Persons to make it.

A search warrant issued under section 131 of "The Liquor License Act," R. S. O. ch. 194, after reciting an information laid by a police inspector, that there was reasonable ground for the belief that spirituous, etc., liquor was being unlawfully kept for sale or disposal contrary to the said Act, in a certain unlicensed house or place, namely, in the house and premises of the Toronto Industrial Exhibition Association, directed the city license inspectors, city constables or peace officers or any of them, to search the said house and premises, and every part thereof, or of the premises connected therewith. In attempting to search defendant's booth, which was described as being under the old Grand Stand on the Exhibition premises, a police sergeant who accompanied the inspector, was obstructed by defendant. The evidence did not shew there was any other booth on the premises:—
Held, that the warrant was valid; that it was sufficiently definite as to the place to be searched and the persons directed to make it.

Statement.

THE prisoner was indicted and tried by a jury at the General Sessions of the Peace for the county of York, on the 14th of March, 1893, under R. S. C. ch. 167, sec. 34, with having on the 12th of September, 1892, at the city of Toronto, unlawfully and wilfully obstructed Robert Vaughan, a constable, in the execution of his duty as a peace officer. There was a second count by the indictment for a common assault on Vaughan.

The evidence shewed that the prisoner was the occupant of a refreshment booth under what is known as the old grand stand on the premises of "The Toronto Industrial Exhibition Company," such premises being properly enclosed with a fence; that on the 11th day of September, 1892, one David Archibald, staff inspector of the Toronto police force, went in company with police sergeant Robert Vaughan and several constables, to the booth of the prisoner, and requested to be allowed to search for liquor; that the prisoner demanded production of the warrant, whereupon a search warrant under section 131 of "The Liquor License Act," R. S. O. ch. 194, duly

executed by the police magistrate, George Taylor Denison, Esq., was produced and shewn to the prisoner. After this the prisoner resisted and obstructed police sergeant Vaughan, who was assisting inspector Archibald in enforcing the execution of the warrant. Statement.

It was shewn in evidence that the warrant had not previously been acted upon, and that this was the only occasion on which search was made under or by authority of the warrant. The warrant in question read as follows :—

“LIQUOR SEARCH WARRANT.

“ONTARIO, } “To all and any of the Inspectors of Licenses in
County of York, } and for the city of Toronto, in the county of York,
To Wit: } and to all or any of the constables and other peace
officers in the city of Toronto, and in the county of York : Whereas, D.
Archibald of the city of Toronto, in the county of York, police inspector,
hath this day laid information on his oath before me, George Taylor
Denison, Esq., police magistrate in and for the said city of Toronto, that
there is reasonable ground for the belief that spirituous or fermented
liquor is being unlawfully kept for sale or disposal, contrary to the pro-
visions of the Liquor License Act, in a certain unlicensed house or place
within my jurisdiction, that is to say, in the house and premises of the
Toronto Industrial Exhibition Association, in the said city of Toronto :
And, whereas, I am satisfied by such information on oath, that there is
reasonable ground for such belief :

“These are, therefore, in the name of our Sovereign Lady the Queen
to authorize and require you and each and every of you, with necessary
and proper assistance at any time or times within ten days from the date
hereof, to enter, and if need be by force, into the said house and premises,
and every part thereof, or of the premises connected therewith, and
examine the same and search for such liquor therein ; and for this pur-
pose to break open any door, lock, or fastening of such premises, or any
part thereof, or of any closet, cupboard, box, or other article likely to
contain such liquor.

“Given under my hand and seal at Toronto aforesaid, this twelfth day
of September, in the year of our Lord one thousand eight hundred and
ninety-two.

“G. T. DENISON.

“Police Magistrate in and for the city of Toronto.”

The jury having found the prisoner guilty as charged, and the following questions of law having arisen upon the evidence, namely :—

1st. Was the said warrant a sufficient authority for search upon the booth in question occupied by the said McGarry ?

Statement.

2nd. Was the said warrant sufficient, being directed generally to all peace officers and not especially to the said David Archibald ?

3rd. Whether the conviction can stand on the evidence as to the kind or description of place which was actually searched ?

4th. Was the conviction good, the act complained of being an assault upon the said Robert Vaughan who accompanied and assisted the said David Archibald, not being an assault upon the said David Archibald himself, in whose custody the search warrant actually was ?

5th. Whether assaults, resistance, or obstructions made upon or offered to constables, or other officers acting under the authority of the Liquor License Act, come under R. S. C. ch. 162, sec. 34 ?

The learned chairman of the General Sessions, at the request of counsel for the prisoner, reserved the questions of law arising on the evidence as to whether the conviction was good, for the opinion of the Justices of this Division of the High Court.

In Easter Sittings, June 2nd, 1893, before GALT, C. J., ROSE, and MACMAHON, JJ., *DuVernet* appeared for the prisoner. Section 131 of the "Liquor License Act," R. S. O. ch. 194, under which the warrant purports to have been issued, provides that when there is reasonable ground for the belief that any spirituous, etc., liquor is being kept for sale in any unlicensed house or place, the magistrate may issue a warrant to search the place named in the warrant. The warrant here was not sufficient to authorize the search to be made. The information and warrant issued thereon should designate the particular place intended to be searched. The facts should be brought before the magistrate and he should exercise his discretion, whether a warrant should issue or not : *Regina v. Walker*, 13 O. R. 80 ; *Gallihew v. Peterson*, 20 Nova Scotia 222 ; *Hawkins' P. C.*, 8th ed., 133, sec. 17 ; *Regina v. Hodge*, 23 O. R. 450. The warrant here was a general warrant, under which all

Argument.

the buildings in the exhibition grounds could be searched. [ROSE, J.: so far as it appears from the evidence the defendant's booth is the only one shewn to exist on the grounds.] The real fact is that the defendant's booth is one of a number of booths on the grounds, under the grand stand. The Act also requires the particular person to execute the warrant to be named in it: *Regina v. Hood*, 1 Moo. C. C. 281. It was, therefore, invalid because directed not to any particular person, but to all or any of the police constables of the city of Toronto. Even assuming that there might be an act of obstruction against inspector Archibald, in whose possession the warrant was, there certainly was none as against sergeant Vaughan, who had no authority whatever in the matter. As to whether R. S. C. ch. 162, sec. 34 applies, since the decision of this Court in *Regina v. Hodge*, this point is not pressed here.

J. R. Cartwright, Q. C., contra. The warrant is to search the house and premises of the Exhibition Association. This comes within the terms of the statute, namely, "a house or place," and premises connected therewith, and every part thereof. The word "place" used in the statute, is moreover wide enough to cover every booth on the grounds; but as pointed out by Mr. Justice ROSE, so far as appears, the prisoner's booth was the only one under the grand stand. The statute, therefore, has been strictly complied with. The magistrate exercised a proper discretion. He acted on the information of inspector Archibald, who stated that he had reasonable grounds for the belief that liquor was being sold. The warrant was properly directed to all the police constables of the city of Toronto.

June 24th, 1893. MACMAHON, J.:—

The ground taken by prisoner's counsel was that the warrant was a general warrant to search the whole of the premises within the enclosure, bounded by the fences of the Industrial Exhibition Association grounds, within

Judgment. which enclosure several buildings were erected; and the
MacMahon, warrant was for that reason bad, and conferred no
J. authority upon the officers executing it.

Lord Hale in his Pleas of the Crown, vol. 2, p. 150, says: "I do take it that a general warrant to search in all suspected places, is not good, but only to search in such particular places where the party assigns before the justice his suspicion and the probable cause thereof; for these warrants are judicial acts and must be granted on an examination of the fact."

By the Act incorporating the "Industrial Exhibition Association," 42 Vic. ch. 81, sec. 2 (O.), "The said association is hereby authorized and empowered, either permanently or periodically, in structures, buildings, enclosures, and places located in the city of Toronto or the township of York, suitable for exhibition purposes, * * to exhibit any and every variety of thing," etc.

Under the 131st section of the Liquor License Act, R. S. O. ch. 194, "Any justice of the peace, upon information by any such officer, policeman, constable or inspector that there is reasonable ground for belief that any spirituous or fermented liquor is being kept for sale * * in any unlicensed house *or place*, * * may grant a warrant under his hand, by virtue whereof it shall be lawful for the person named in such warrant at any time or times within ten days from the date thereof to enter, and, if need be, by force, the *place* named in the warrant, and every part thereof, or of the premises connected therewith, and examine the same and search for liquor therein," etc.

The warrant recites the information which alleges that there is reasonable ground for belief that spirituous or fermented liquor is being sold "in the house and premises of the Toronto Industrial Exhibition Association, in the city of Toronto." And the warrant directs the officers named to search "the said house and premises and every part thereof, or of the premises connected therewith." The evidence shews that the prisoner was the occupant of a refreshment booth under the grand stand which

formed part of, "or was connected with the premises" of the Industrial Exhibition Association. Judgment.

MacMahon,
J.

The premises of the Industrial Exhibition Association, where the information alleged liquor was being unlawfully kept for sale, comprise "the structures, buildings, enclosures, and places" where under the Act it is authorized to exhibit. By the Liquor License Act, and under the warrant, the officer is authorized to search the place named in the warrant, "and every part thereof, or of the premises connected therewith." So that being entitled to search every part of the premises of the exhibition association, there is no exception to such right of search by reason of the prisoner being in occupation of a part of such "premises."

An enclosed yard or ground, whether roofed over or not and however large its dimensions may be, is a "place:" Stroud's Judicial Dictionary, tit. Place, citing *Eastwood v. Miller*, L. R. 9 Q. B. 440, where the appellant was the occupier of Carham grounds in which a pigeon-shooting match between two persons for £10 a side, and afterwards a foot-race took place, and into which the public were admitted on payment of money. It was held that the grounds were a "place."

The 131st section of the License Liquor Act, mentions "house or place," so that under a warrant to search the "place" of the industrial association according to the above decision, the whole of the premises, within the enclosure made by the fences, would be included therein.

A person obtaining leave to erect a booth or tent for the sale of refreshments on cricket or lacrosse grounds, a warrant to search such cricket or lacrosse grounds, premises, or "place" for contraband liquor, would entitle the officer entrusted with the warrant to search the booth or tent of the person occupying the same. So if a warrant issues to search the house or premises being, say, number thirty-five on a named street, the officer is empowered to search not only the main portion of the house, but also the upper rooms; although the occupant of such rooms may not be

Judgment. the person occupying the main portion of the house—
MacMahon, otherwise there might be no means of reaching the person
J. violating the Act.

Cases may arise where tenants occupying what are known as "compartment flats," and where each set of compartments forms distinct and separate premises; in such case there might be no justification for searching any compartments but such as were named in the warrant. It will, however, be time enough to deal with such a case when it is presented for consideration.

Here the warrant was to search the premises of the Industrial Exhibition Association, part of which premises was being searched when resistance to the officers was made by the prisoner.

In my opinion the warrant was a sufficient authority to search the booth occupied by the prisoner.

As to the second question reserved. The warrant need not be, as contended by the prisoner's counsel, addressed to David Archibald because he as inspector laid the information. The 131st section provides: it shall be lawful for the person named in such warrant at any time, * * and, if need be, by force, the place named in the warrant, * * and examine the same and search for liquor therein; and for this purpose may, with such assistance as he deems expedient, break open any doors," etc.

The warrant is properly directed when directed to a constable or other public officer, and should not be directed to a private person: Chitty's Criminal Law, 2nd ed., vol. 1, p. 65. If so, it may be addressed to all the constables and peace officers within the territorial jurisdiction of the magistrate granting the warrant.

The third question has been disposed of in the opinion by which the first question reserved has been answered.

The fourth question is answered by the reference already made to the search warrant being directed "to all of the constables and peace officers in the city of Toronto." And section 131 of the Liquor License Act, authorizes the officer to whom the search warrant is addressed, to secure

such assistance as he deems expedient for the search for such liquor. Besides, Vaughan is a constable, and is one of the officers to whom the warrant is in terms addressed. Judgment.
MacMahon,
J.

The fifth question reserved, was not argued by counsel for the prisoner, as he admitted, the judgment of this Division in *Regina v. Hodge* (23 O. R. 450), was against him on the point raised.

There must be judgment for the Crown on all the questions in the case reserved.

ROSE, J.:—

We are asked our opinion on the facts as stated in the case, and on them only.

It is stated as set out by my learned brother, "that the prisoner was the occupant of a refreshment booth under what is known as the old grand stand on the premises of the Toronto Industrial Exhibition Association, such premises being properly enclosed with a fence." It is not stated that there was any other booth on said premises or any other person occupying the premises. No question is therefore submitted to us as to the sufficiency of such a warrant to authorize a search of the prisoner's booth as being one of many booths occupied by different persons under separate holdings or leases.

Nor is it stated in the statement of the case that there was any building on the premises save the "old grand stand."

For all that appears on the facts as stated, there was but one building on the premises, and but one booth in the building, and but one occupant of the premises, namely, the occupant of the booth. On such a statement of facts, a warrant to enter the house and premises of the association and make search therein, would manifestly be sufficient.

To raise the question sought to be raised before us on argument, it would be necessary to send the case back for amendment, but the opinion expressed by the other members of the Court, renders this unnecessary.

Judgment.

Rose, J.

I content myself by saying that on the facts as stated, the first and third questions must be answered in the affirmative.

I agree that the remaining questions must be answered for the Crown.

GALT, C. J., concurred.

[COMMON PLEAS DIVISION.]

REGINA V. HOGARTH.

Justice of the Peace—Summary Trials Act—Trial of Defendant for Felony without Consent—Conviction—Quashing.

The defendant on being charged before a stipendary magistrate with felonious assault, pleaded guilty to a common assault, but denied the more serious offence. The magistrate, without having complied with the requirements of section 8 of the Summary Trials Act, R. S. C. ch. 176, by asking defendant whether he consented to be tried before him or desired a jury, proceeded to try and convicted the defendant on the charge of the felonious assault :—

Held, that the defendant was entitled to be informed of his right to trial by a jury, and that the conviction must be quashed.

Where a statute requires something to be done in order to give a magistrate jurisdiction, it is advisable to shew, on the face of the proceedings, a strict compliance with such direction.

Statement.

This was a motion to make absolute an order *nisi* to quash a conviction made by Wm. Doran, stipendary magistrate of the district of Thunder Bay, convicting the defendant of having on the 27th of May, 1892, at the town of Mattawa, in the said district, feloniously assaulted one H. J. Kart, for which offence the defendant was convicted and fined, and ordered to pay the costs.

When the charge was read by the magistrate to the defendant, he pleaded guilty to assault and battery, but denied the aggravated assault. The trial proceeded, and the defendant being convicted upon the charge laid against him the present motion was made, the ground taken being that the defendant never consented to be tried summarily on the charge, and he was not asked by the magistrate to consent to be so tried.

In Easter Sittings, May 29th, 1893, the motion was argued before GALT, C. J., ROSE, and MACMAHON, JJ. Argument.

Douglas Armour, supported the motion. The magistrate had no jurisdiction to try the offence for which the defendant was convicted. The defendant pleaded to a charge of common assault but denied the aggravated assault. There was no power to try him for the serious offence of aggravated assault without having complied with the requirements of section 8 of R. S. C. ch. 176. The defendant understood that the trial was proceeding merely for the purpose of ascertaining whether the magistrate could receive the plea of common assault, and he was not aware that he was being tried for the charge of aggravated assault. It is only necessary to read the affidavits and papers returned to see that the section was not complied with, and the fact of its being complied with must appear on the face of the proceedings: *Paley on Convictions*, 7th ed., 186, where the cases are collected.

A. H. Marsh, Q. C., contra, for the magistrate. The proceedings were regular, and the objection namely, as to the necessity of the fact of the statute having been complied with appearing on the face of the proceeding, is purely one of form, and a conviction will not be quashed for want of form.

Middleton, for the private prosecutor. The objection as pointed out, is purely one of form. The magistrate, in effect, asked the question required by section 8. He asked the defendant if he were willing to be tried summarily, to which the defendant consented; and the only defect, if any, is that the question and answer is not reduced to writing and does not appear on the face of the proceedings. All that is necessary to comply with the statute is a consent in fact: *Taylor v. Clemson* 11 Cl. & F. 610; *Paley on Convictions*, p. 184. Section 24 of R. S. C. ch. 176, shews that a conviction will not be quashed for a mere matter of form.

Armour, in reply. The objection is not one of form,

Argument. but of jurisdiction. The magistrate must shew on the face of the proceedings that he has jurisdiction. As a matter of fact, the defendant merely consented to be tried for the offence of common assault. The case of *Taylor v. Clemson*, 11 Cl. & F. 610, does not apply here. It was a civil and not a criminal proceeding where greater strictness is required.

June 24th, 1893. MACMAHON, J.:—

In the proceedings before the magistrate while it appears the defendant pleaded guilty to a common assault, it is not disclosed that the defendant was asked in accordance with the requirement of section 8 of the Summary Trials Act R. S. C. ch. 176, viz.: "Do you consent that the charge against you shall be tried by me, or do you desire that it shall be sent for trial by a jury," etc.

The affidavit of the defendant states that the magistrate did not ask his consent to be tried summarily, nor was he given to understand that he had a choice to elect as to the mode of trial.

The affidavit of the magistrate is that when the defendant pleaded guilty to a common assault he (the magistrate) said he could not accept such plea until he had heard some of the evidence, and asked Hogarth if he was willing to be tried summarily by him, and the defendant Hogarth consented thereto. In this the magistrate is confirmed by John McMeekin, clerk of the Division Court, at Mattawa, who was present at the trial.

It is evident that what was done by the magistrate in no way complied with the statute, as the defendant may very properly have assumed from what the magistrate said that the evidence he intended taking was merely to satisfy the Court that the plea pleaded was one proper to be accepted. Had the magistrate said to the defendant, the words, or words of the like effect, to those contained in the statute, the defendant would thereby have been apprised that he had the option of being tried by a jury. But from

the affidavits of the magistrate himself and of McMeekin, the defendant was not made aware that he could elect to be tried by a jury, and there was therefore no compliance with the Act; and the defendant might have well supposed that the investigation was being proceeded with for the limited purpose sworn to by the magistrate, *i. e.*, to see if the plea of a common assault was one properly receivable. Moreover, the defendant did not understand that he had given authority to the magistrate to try him on the more serious charge of an aggravated assault; or even that the magistrate was trying him on such charge.

Judgment.
MacMahon,
J.

It were well where there is a statutory direction that the magistrate should in every case strictly comply with it. And while not expressing an opinion that the consent of the defendant to be tried summarily not appearing on the face of the proceedings would of itself have been a sufficient ground for quashing the conviction, it is advisable to shew, on the face of the proceedings, that which the statute says is necessary to be done in order to give the magistrate jurisdiction, was so done by him.

It is clear the direction in the statute requiring the magistrate to inform the defendant of his right to trial by jury was not complied with in this case, and the conviction must therefore be quashed, but without costs.

There will be the usual protection to the magistrate and the officers.

GALT, C. J., and ROSE, J., concurred.

[COMMON PLEAS DIVISION.]

REGINA V. BURKE ET AL.

Criminal Law—Speedy Trials Act—Bail Surrendering—Right to Elect to be Tried Summarily—Subsequent Indictments Quashed—Several Offences—Valuable Security.

The surrender of defendants out on bail, including the surrender by a defendant himself out on his own bail, committed to goal for trial, has the effect of remitting them to custody, and enables them to avail themselves of the Speedy Trials Act, 52 Vic. ch. 47 (D), and to appear before the County Judge and elect to be tried summarily; and where defendants had so elected, indictments subsequently laid against them at the assizes, were held bad and quashed even after plea pleaded where done through inadvertence, sec. 143 of R. S. C. ch. 174, not being in such case any bar.

Two indictments were laid against defendants, one for conspiracy to procure W. to sign two promissory notes; and the other for fraudulently inducing W. to sign the documents representing them to be agreements, whereas they were in fact promissory notes :—

Held, that several offences were not set up in each count of the indictments: that it was no objection to the indictments that the notes might not be of value until delivered to defendants; and further, that under sec. 78 of R. S. C. ch. 164, an indictment would lie for inducing W. to write his name on papers which might afterwards be dealt with as valuable securities.

Rex v. Danger, 1 Dears. & B. 307, 3 Jur. N. S. 1011; *Regina v. Gordon*, 23 Q. B. D. 354, considered.

Statement.

AT the Autumn Assizes, 1892, for the county of Wellington, at Guelph, two true bills were found by the grand jury against the prisoners. One for conspiracy to procure the prosecutor, John Worthingham, to sign two promissory notes each for the sum of \$168 and payable to the defendant, A. L. Burke, or bearer, respectively in three and six months after date.

The second indictment charged that the defendants did by false pretences fraudulently cause and induce the prosecutor, John Worthingham, to sign two certain papers representing that they were agreements between the said Worthingham and one of the defendants A. L. Burke as to the hiring by said Burke of Worthingham, as his (Burke's) agent, when in truth the papers Worthingham was so induced to sign were not such agreements, but valuable securities, to wit, promissory notes for \$168 each, payable

in three and six months after date to the defendant A. L. Statement. Burke or bearer.

The defendants by the solicitor who was acting as the Guelph agent of George Lynch-Staunton, who had been retained as counsel for the defendants, pleaded "not guilty" to each of the indictments.

Orders *nisi* were obtained in each case at the Easter Sittings, 1893, to quash the indictments, the grounds for the motion being the same in each case.

It is only necessary to state the grounds which are dealt with by the judgment which are: That the indictment was found without any jurisdiction by the grand jury to find the same; that the defendants were charged with two offences in one count of the indictment; that the documents alleged to be promissory notes in the indictment were shewn by the indictment not to be promissory notes, but were at most inchoate and incomplete: that the documents said to be promissory notes were not valuable securities within the meaning of section 78 of the Larceny Act; and that such documents were not promissory notes when the alleged false representation was made.

That the defendants having elected to be tried by the County Court Judge, the Court had no jurisdiction to try them.

In Easter Sittings, May 29, 1893, before the Common Pleas Division composed of GALT, C. J., ROSE and MACMAHON, JJ., *G. Lynch-Staunton*, supported the orders *nisi*. The Grand Jury had no power to find the bills, and the Court had no jurisdiction to try the indictments. The defendants had the right to elect as to their mode of trial, and they elected to be tried before the County Judge. The bondsmen for the defendants Cooper had the right to surrender them to the sheriff, and the defendant Burke had also the right to surrender himself. This was acquiesced in by the County Crown Attorney, and a time fixed for the defendants to appear before the County Judge. They

Argument. did appear, and their statutory rights should not have been denied them. Unless the defendants could surrender themselves they might never be able to get rid of the charge. When the defendants elected to be tried before the County Judge, the assizes were ousted of jurisdiction: *Nethersole's Bail*, 2 Chitty 99; *Schroder on Bail*, 145. [MACMAHON, J., referred to Archbold's Crown Prac. 52, where it is said a party can come in and surrender himself in outlawry.] The fact of the defendants' counsel having entered a plea of not guilty to the indictments does not debar them from now moving to quash. The pleas were pleaded under a misapprehension. The Courts, however, will allow the pleas to be withdrawn: *Regina v. Bunting*, 7 O. R. 118, 524. There are two distinct offences in the indictments, namely, charging that the defendants procured the prosecutor (1) to sign two promissory notes, and (2) to sign two certain papers, representing they were agreements, whereas they were notes: *Roscoe's Criminal Evidence*, 11th ed., 190. The notes were not promissory notes. They were not intended to be promissory notes, and were never delivered as promissory notes. Under sec. 83 of the Bills of Exchange Act, 53 Vic. ch. 33 (D.), the document is incomplete until delivery, *i. e.*, it is not a valid contract or negotiable security until delivered. The notes also were not valuable securities within the meaning of the Act, as the Act means a valuable security to the person parting with it on the false pretence: *Regina v. Brady*, 26 U. C. R. 13; *Smythe's Bills and Notes*, 34, 132, 154. The notes also were void under secs. 12-14 of the Patent Act R. S. C. ch. 123, because they had not the words "given for a patent right" written across them.

J. R. Cartwright, Q. C., for the Crown, contra. The defendants have misconceived their remedy. The remedy should have been by demurrer or motion to quash before pleading. Section 143 of the Criminal Procedure Act, R. S. C. ch. 174, expressly provides that every objection to any indictment for any defect apparent on the face thereof shall be taken by demurrer, or motion to quash the indictment before

the defendant has pleaded, and not afterwards. There was jurisdiction in the High Court to try the indictments. The Speedy Trials Act does not oust the jurisdiction of the High Court. There is a clear distinction between the wording of sec. 61 of the R. S. C. ch. 175, and sec. 11, of the substituted Act 52 Vic. ch. 47 (D.). In the Revised Statutes the words used are, "the Judge *shall* proceed to try," etc., while in the 52 Vic. the words used are, "the Judge *may* proceed," etc., thus shewing that instead of it being peremptory on the Judge, it is merely permissive, and the Judge can therefore exercise his discretion, and having done so and refused to try the defendants, the High Court had jurisdiction to do so. To bring the defendants within the provisions of the Speedy Trials Act, the defendants must be in custody, and persons on bail are certainly not in custody, and there is no provision for the defendants being surrendered, and clearly none authorizing a defendant out on his own bail to surrender himself. There were not two offences charged. It was all one offence. The notes were valuable securities within the meaning of the Act: *Regina v. Gordon*, 23 Q. B. D. 354, which overrules the earlier cases. They were also delivered, and it was not essential that they should have endorsed across them the words required by the Patent Act. This only applies to civil actions.

Argument.

June 24th, 1893.—MACMAHON, J.

The defendants having pleaded to the indictments the first question is whether they can now move to quash.

By section 143 of the Procedure Act, R. S. C. ch. 174: "Every objection to any indictment for *any defect apparent on the face thereof*, shall be taken by demurrer or motion to quash the indictment, before the defendant has pleaded, and not afterwards," etc.

The point here raised was considered in *Regina v. Heane*, 4 B. & S. 947, where Cockburn, C. J., in giving judgment at p. 956, said: "The two first objections, namely, that a

Judgment.

MacMahon,
J.

motion to quash an indictment cannot be made after plea pleaded, nor on affidavit, ought not to have any effect. The Court is not ousted of its power to quash an indictment because a plea has been pleaded. If it is made apparent either on the face of the record or by extrinsic evidence that there is a want of jurisdiction, we should quash the indictment after plea pleaded; for at the time of pleading a man might not be aware of the defect of jurisdiction; also this application *may* be made upon affidavit, though there may be no analogous or similar case in which that has been done. In ordinary cases the defect in jurisdiction would appear on the face of the indictment; but it is not necessary to allege in the indictment that the preliminaries required by statute 22 & 23 Vic. ch. 17, before preferring it, have been complied with; and therefore here the defect *must* be brought to our knowledge by affidavit."

The ground taken by the defendants is that they had elected to be tried by the County Court Judge under the Speedy Trials Act, and, having so elected, they cannot be deprived of such right because indictments were found against them at the assizes for the offences for which they had so elected to be tried, although through the mistake or error of their junior counsel a plea of "not guilty" was by him entered on each of the indictments.

The affidavit of the defendant Burke states that a warrant for the arrest of himself and his co-defendants was issued by the police magistrate of the city of Guelph on an information charging them with a conspiracy to defraud Worthingham, substantially as set out in the second indictment before referred to. That the defendants were arrested on said warrant, and the magistrate admitted them to bail; and on the 28th of March they appeared and the charge was investigated, and the magistrate announced there was sufficient evidence to commit the defendants for trial on a charge of conspiracy to defraud, and he did so commit them. That all the defendants were admitted to bail. That Mr. Staunton was

retained to defend the defendants on the said charge, and Mr. J. A. Mowat of Guelph was also retained to assist him, and to act as Mr. Staunton's agent in Guelph. That on Thursday the 30th day of March, Mr. Mowat saw the Crown Attorney and asked him to have the defendants brought before the County Judge for trial on Saturday, the 1st of April, on which day Burke surrendered himself, and the bondsmen for his co-defendants surrendered them to the sheriff at his office: and the said sheriff then made out a list for the Judge; but that afterwards the sheriff said he had seen Mr. Peterson, the Crown Attorney, who had forbidden him to receive the defendants or to allow them into the jail—assigning as a reason that Burke could not surrender himself as he was out on his own bail. That Mr. Mowat afterwards saw Judge Chadwick, and then saw Mr. Peterson who agreed to appear before the Judge and have the question as to the right of Burke to surrender himself determined. That the sheriff, Mr. Peterson, Mr. Mowat, and the defendants appeared before the County Judge, who decided that the defendant Burke could surrender himself, and had a right to elect to be tried before him. That Mr. Mowat on behalf of the defendants offered to give bail and asked that a day should be fixed for the trial. That Mr. Peterson said the depositions were in the hands of the Crown Counsel at Toronto, but such depositions would be in Guelph on Monday, and as the matter would not go before the grand jury until Tuesday, there would be plenty of time to dispose of the matter on Monday. That Peterson said that he did not wish to inconvenience the defendants by having them remain in jail over Sunday or troubling as to fresh bail, and that the matter could stand until Monday. That the County Judge fixed three o'clock on Monday for the parties to appear, and that Mr. Mowat suggested and asked that the defendants be treated as if in actual custody, the sheriff to have formal custody over them, and to this Mr. Peterson assented, and the sheriff understood it in that way. That on Monday, at three o'clock the defendants accompanied

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J.

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MacMahon,
J.

by the sheriff, Mr. Clement, the Crown Counsel at the assizes, Mr. Peterson and Mr. Mowat appeared before Judge Chadwick, when Mr. Clement urged that he (Burke) being out on his own bail could not surrender to be tried before the County Judge. That Mr. Mowat urged that the question had been settled by the Judge and disposed of on Saturday. That the County Judge adhered to what was stated on the Saturday. That the Crown then took the objection that the defendants must be in actual custody and confined in jail before they could elect under the statute giving them right of electing to be tried by the County Judge. That the County Judge stated that he understood it was arranged on Saturday, and the matter stood over on account of the depositions not being in Guelph, but that Mr. Peterson withdrew what he had said, and stated that the Judge must have misunderstood him. That as Mr. Peterson repudiated the arrangement, and as the Crown pressed the objection, the Judge would not proceed, although it was stated that the defendants were anxious to be tried by the County Judge. That Mr. Staunton, fearing the Crown might prefer indictments against the defendants, had instructed him (Burke) not to plead to any indictment until he (Staunton) had an opportunity of considering same with the object of moving to quash or demur there to. And that he did not intend Mr. Mowat to plead nor was he aware of his intention to plead to the indictments.

The affidavit of Mr. Mowat is filed in which he confirms what is stated in the affidavit of Burke as to the interviews with the County Attorney; the surrender of the defendants to the sheriff; the preparation by the sheriff of the list or notification for the Judge; and also as to what took place when defendants were before the Judge and made their election. Mr. Mowat accounts for his pleading to the indictments by stating that when the indictments were found by the grand jury at the Assizes on the 3rd day of April, and the Crown Counsel was insisting upon the defendants being arraigned, he applied for a postponement of the trials, and

was informed by Mr. Justice Rose, the presiding Judge, that it would be necessary before moving to postpone, that a plea should be entered for the defendants; and that he, acting on their behalf, and assuming he had authority so to do, indorsed a plea of "not guilty" on each of the indictments.

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MacMahon,
J.

As to the question of surrender, the two defendants, W. A. Cooper and J. C. Cooper, having been surrendered to the sheriff by their bail they were in the custody of the sheriff, and it was his duty to confine them in gaol as the bail was by the surrender released from his recognizance. As to the defendant Burke, who was bailed on his own recognizance, his right to render himself is concluded by *Nethersole's Bail*, 2 Chitty 99, where Lord Ellenborough said, "the party may render himself": see also Archbold's Crown Prac. 52.

The Speedy Trials Act, 52 Vic. ch. 47, sec. 5 (D.), provides that "Every person committed to gaol for trial on a charge of being guilty of an offence for which he may be tried: (a) In the Province of Ontario, by the Court of General Sessions of the Peace * * may, with his own consent * * be tried under the provisions of this Act out of sessions * * whether the Court before which, but for such consent the said person would be triable for the offence charged or the grand jury, is or is not then in session," etc. And by section 6, "Every sheriff shall within twenty-four hours after any prisoner charged as aforesaid is committed to gaol for trial notify the Judge in writing that such prisoner is so confined, stating his name and the nature of the charge preferred against him,—whereupon with as little delay as possible, such Judge shall cause the prisoner to be brought before him." By section 7, "the Judge, upon having obtained the depositions on which the prisoner was so committed shall state to him:—

- (a) That he is charged with the offence, describing it;
- (b) That he has the option to be forthwith tried before such Judge without the intervention of a jury," etc.

Judgment.

MacMahon,
J.

(2) If the prisoner demands a trial by jury the Judge shall remand him to gaol; but if he consents to be tried by the Judge without a jury, the County Attorney or clerk of the peace shall draw up a record," etc.

A surrender having taken place, and the defendants being in the custody of the sheriff, he prepared the necessary notice to the Judge as required by the 6th section of the Act. The affidavits are clear that the County Judge fixed three o'clock on the Monday for the defendants to appear; that they did appear and had a right to elect to have a speedy trial, and no objection by the counsel for the Crown was entitled to prevail against this statutory right if the defendants were in a position to avail themselves of it.

The defendants were by the police magistrate "committed to gaol for trial;" they gave bail to appear for trial, so that when they were rendered by their bail, they stood in the same position as if they had never been bailed, and were therefore "committed to gaol for trial;" and, if so committed, they were confined, as far as it was necessary for the sheriff so to do, when they were almost immediately brought before the Judge to elect as to the mode of their trial. The date for proceeding under the Speedy Trials Act was fixed by the Judge, and the defendants having appeared, they had a right to be tried by the forum, which the statute said should be theirs if they so elected. They cannot be deprived of that right because the Crown Counsel had determined on presenting bills and having them found by the grand jury; for the statute says they may elect to be tried, although the grand jury is sitting. And the fact of the defendants' solicitor having pleaded to the indictments under the circumstances disclosed in the affidavits should not preclude them from having the indictments quashed.

There are not two charges against the defendants in the one count in either indictment. What is charged in the one indictment is, that the defendants conspired to procure the prosecutor to sign two promissory notes. The

whole was a conspiracy to accomplish one object, that is, to obtain the prosecutor's signature to two promissory notes. And in the other indictment they are charged with obtaining by false pretences the signature of the prosecutor to two papers representing they were agreements, when in fact they were promissory notes. It was one false pretence, although two notes were obtained by means of the one pretence. If by a false pretence a horse and harness are obtained at one time, there are not two false pretences, unless the horse is parted with by reason of one false pretence and the harness is parted with by reason of another and different false pretence.

The ground thus taken is to my mind not tenable.

As to the ground taken by defendant's counsel, founded upon the case of *Regina v. Brady*, 26 U. C. R. 13 (which was decided upon the authority of *Rex v. Danger*, 1 Dears. & B. 307, 3 Jur. N. S. 1011), that the notes signed were not "valuable securities" as the statute meant valuable security to the person who parts with it on the strength of the false pretence. After the decision in *Regina v. Danger*, and in consequence of it the statute was amended: Archbold's Crim. Pl. (20th ed.) 556. And see *Regina v. Gordon*, 23 Q. B. D. 354, where it was held that where the charge was for fraudulently causing a person to "make a valuable security," the indictment was good, although the promissory note might not be of value until it had been delivered into the hands of the prisoner.

Upon the point now being considered, the Queen's Bench Division in *Regina v. Rymal*, 17 O. R. 227, following *Rex v. Danger*, which is not now law.

In the indictment in *Regina v. Gordon*, 23 Q. B. D. 354, the document was described as a promissory note, although as properly said by the Court, it might not be of value until it was delivered into the hands of the prisoner.

Under R. S. C. ch. 164, section 78, the charge might be for fraudulently inducing the prosecutor to write his name on a paper so that the same might afterwards be

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Judgment. used and dealt with as a valuable security : See *Regina v. Rymal*, 17 O. R. 227, at p. 231.

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J.

The defendants having elected and having a right to elect to be tried under the Speedy Trials Act, the indictments should not have been presented to the grand jury, and must be quashed.

ROSE, J. :—

I entirely agree to the conclusion reached by my learned brother MACMAHON, that the defendants were entitled to a Speedy Trial and should not have been indicted at the Assizes, and for that reason that the indictments should be quashed.

I have not considered the other grounds taken in the motion.

GALT, C. J., concurred.

[COMMON PLEAS DIVISION.]

ROBERTSON V. GRAND TRUNK RAILWAY COMPANY.

'Railways—Special Contract Limiting Liability—Validity of.

The plaintiff on shipping a horse by defendants' railway signed a document, called a "Live Transportation Contract," which stated that the company received the horse for transport at the special rate of \$7.20; and in consideration therefor, it was mutually agreed that defendants should not be liable for any loss or damage, etc., except in case of collision, etc., and should in no case be responsible for an amount exceeding \$100 for each or any horse, etc., transported. In a collision caused by the negligence of the defendants, the horse was killed :—

Held, that the agreement constituted a special contract limiting the defendants' liability to the amount named, and that section 246, subsection 3, of the Railway Act, 51 Vic. ch. 29 (D.), did not apply so as to prevent the defendants from claiming the benefit of the contract where negligence was proved.

Vogel v. Grand Trunk R. W. Co., 2 O. R. 197, 10 A. R. 162, 11 S. C. R. 612; and *Bate v. Canadian Pacific R. W. Co.*, 14 O. R. 625, 15 A. R. 388, considered.

THIS was an action tried before FALCONBRIDGE, J., and Statement.
a jury, at the St. Catharines Assizes, on the 7th of March, 1892.

The action was against the defendants as common carriers, to recover the value of a racehorse called "Henry R," received by the defendants from the plaintiff, to be carried from Windsor to St. Catharines.

The following was the contract signed by the agent of the railway company and the shipper (the plaintiff) at the time the horse was shipped :—

"GRAND TRUNK RAILWAY COMPANY LIVE STOCK
TRANSPORTATION CONTRACT.

Live Stock of all kinds must be receipted for at the risk of the owner, and this contract must be signed by him before shipment. Stock contracts will be carefully filled up in duplicate and properly signed, one copy being handed to the shipper and the other retained by the agent. * *

Statement.

“Windsor Station, September 15, 1891.

No. of Car 7270, G. T. R.

“Received of George D. Robertson one horse—owner’s risk. Consigned to George D. Robertson, to be transported over the Grand Trunk Railway and delivered at St. Catharines, Ont., station, at the special rate of seven 20/100 dollars under the terms of this contract. And in consideration of said agreement to transport at said special rate it is hereby mutually agreed by and between the parties hereto that the said Grand Trunk Railway Company shall not be liable for any loss or damage which the shipper or owner of said live stock may suffer by reason of delay or by the escape or loss of any stock from cars, or by reason of injuries to animals arising from the bruising or wounding of themselves or each other or from crowding in the cars, * * or by reason of any other injuries or damage happening to said stock while in the cars of said company, except such as may arise from a collision of the train or the throwing of the cars from the track during transportation; and said company shall in no case be responsible for any amount exceeding one hundred dollars for each or any horse or head of cattle, or ten (10) dollars each for sheep, hog, or calf transported.

“Said stock is to be loaded, unloaded, fed, watered, and otherwise cared for while in the car by the shipper or owner, and at his expense and risk. * * The regulations above set forth are expressly declared to be a part of this contract. In case of any loss or damage arising for which said company shall become liable, the same shall be computed and paid for on a basis not exceeding the value of the stock at the place of shipment under this contract * * It is hereby further agreed that the Grand Trunk Railway Company shall not be liable for an amount exceeding the values above mentioned for each or any animal transported.”

The above contract was signed in duplicate, one copy being delivered to the plaintiff, and the other retained by the railway company’s agent.

It was admitted that the horse was killed on the 16th of September, 1891, by a collision on the railway, caused by the negligence of the servants of the defendant company. Statement.

The defendant company paid into court \$100, which it alleged was the extent of its liability under the contract with the plaintiff.

The only question submitted to the jury was as to the value of the horse on the day it was killed, which the jury found to be \$5,000.

The learned Judge reserved his decision on the question as to there being any right to recover beyond the \$100, and subsequently delivered the following judgment:

29th August, 1892. FALCONBRIDGE, J. :—

Although there is a general denial in the statement of defence, it was not denied at the trial that the collision, whereby the plaintiff's horse was killed, was caused by the negligence or omission of the servants of the defendant company.

Although other points were taken on each side, the decisive question here is, whether section 246, sub-section 3 of "The Railway Act," 51 Vic. ch. 29 (D.), applies so as to prevent the company from claiming the benefit of the terms of the "Live Stock Transportation Contract," signed by the plaintiff as shipper, so as to limit their liability to \$100.

The clause in the contract is as follows:

"And in consideration of said agreement," etc., (setting out the contract.)

It is, in my opinion, the logical and inevitable result of the case of *Vogel v. Grand Trunk R. W. Co.*, 2 O. R. 197; 10 A. R. 162; 11 S. C. R. 612, that "the provisions of the Act extend to prevent limitation of liability, quite as well as to prevent denial of liability," to adopt the language of Mr. Justice Rose in *Bate v. Canadian Pacific R. W. Co.*, 14 O. R. 625, at p. 636.

Judgment. Of like opinion, appears to have been Mr. Justice Falconbridge, J. Patterson in *Bate v. Canadian Pacific R. W. Co.*, 15 A. R. 388, at p. 390.

And I gather from the remarks of the late Chief Justice of the Common Pleas Division, at p. 640, of the same case in 14 O. R., that the present Chief Justice of the Queen's Bench Division, held the same view.

It would occur to me without being thus fortified, that to limit the liability to be imposed is necessarily to relieve the company from the action, at any rate *pro tanto*.

I do not think that the "special rate" mentioned in the contract, is a special rate within the contemplation of those learned Judges who have attached importance to that element in the cases.

There will be judgment in accordance with the finding of the jury fixing the value of the horse for the plaintiff for \$4,900, in addition to the \$100 paid into Court.

In Hilary Sittings, 1892, the defendants moved on notice to set aside the findings of the jury and judgment entered for the plaintiff, and to have the judgment entered for the defendants.

In Michaelmas Sittings, December 6, 1892, before a Divisional Court composed of ROSE and MACMAHON, JJ., Osler, Q. C., and Wallace Nesbitt, supported the motion. The distinct feature of this case is, that by the "Live Stock Transportation Contract" the liability is limited to \$100; and the question is whether sub-sec. 3 of sec. 246 of "The Railway Act," 51 Vic. ch. 29 (D.), prevents the company from setting up the special contract and limiting its liability. There is a very great distinction between this case and *Vogel v. Grand Trunk R. W. Co.*, 2 O. R. 197; 10 A. R. 162; 11 S. C. R. 612. In that case there was a total denial of liability, while here there is a special contract fixing a value on the horse, and a rate to be paid on such value; and if of a higher value, a higher rate was to be paid. In that case also it was laid down by some of

the Judges that the words used in the section, namely, Argument.
 “notice, condition, or declaration” contemplated a public or general notice, and did not refer to a special contract. There is also a marked distinction between the section in the Revised Statutes under which *Vogel v. Grand Trunk R. W. Co.*, was decided, and the section in the present Act. In the Revised Statutes the words used are “all trains,” while in the present Act the words are “all regular trains,” thus by the latter Act limiting the liability to regular trains, and the train here was a special train. At common law there would be no liability. Before the institution of railways, carriers by land did not carry horses; and further, special contracts were clearly recognized; and since the introduction of railways, unless in the Acts incorporating railways, or affecting railways, there is some express restriction against it, there is nothing to prevent railway companies from entering into special contracts. Horses cannot be shipped like ordinary goods; they require special care and attendance and special cars, and of necessity would require a special contract to be entered into regarding their carriage: *McCarthy v. Great Western R. W. Co.* 12 App. Cas. 227. There is no question as to the reasonableness of the contract. By the freight paid the company gets two things, namely, payment of the cost of carriage and for insurance against loss; and it would be most unreasonable to impose on the company for the small amount paid here the heavy liability sought to be charged against it by the plaintiff. There is an essential difference between the principle of the decisions of the American cases and our own. In the United States there must be express statutory enactment to enable companies to enter into special contracts of this kind, while here there must be special enactment preventing them from entering into them. The American cases, however, are in the defendants’ favour, for they lay down the doctrine that limitation of liability does not mean relief from liability: *Hart v. Pennsylvania R. W. Co.*, 112 U. S. R. 331; *Richmond and Danville R. W. Co. v. Payne*, 42 Am. & Eng. Ry. Cas. 366; *Pacific Ex-*

Argument. *press Co. v. Foley*, 46 Am. & Eng. Ry. Cas. 680; *Durgin v. American Express Co.*, 45 Am. & Eng. Ry. Cas. 325; *Kansas City v. St. Joseph and Council Bluffs R.W. Co.*, 34 Am. & Eng. Ry. Cas. 219; *Hill v. Boston Housac Tunnel and Western R. W. Co.*, 28 Am. & Eng. Ry. Cas. 87. The case of *Bate v. Canadian Pacific R. W. Co.*, 14 O. R. 625; 15 A. R. 388; 18 S. C. R. 697, does not affect the present one. There the question was, was there a valid contract entered into; and had it been proved that a contract had been entered into there would have been no question as to the validity of the limitation of liability. See also *Anderson v. Grand Trunk R. W. Co.*, 17 O. R. 747; 17 A. R. 480; *McMillan v. Grand Trunk R. W. Co.*, 12 O. R. 103, 112; *Watkins v. Rymill*, 10 Q. B. D. 178; *Smith v. City of London Ins. Co.*, 11 O. R. 38; *Burke v. South Eastern R. W. Co.*, 5 C. P. D. 1. The rates charged under the special contract were under the statute submitted and approved by the Governor-in-Council, and therefore in effect had legislative sanction. The next point is, that the verdict is clearly excessive. In a certificate given by the plaintiff to the custom's officer, he places the value at \$1,500, and puts in an affidavit proving it. [*Collier*. This cannot be put in now.] The defendants did not know of it until after the trial. The document is, however, producible as documentary evidence. Evidence was also given that the plaintiff purchased his partner's share at \$1,000. The value of this class of horse depends on its rate of speed, and while the evidence disclosed that the highest rate of speed is 2.04, the rate of speed of this horse was only 2.14, the price of such class of horse being only about \$600.

Collier, contra. There was no special contract here, but merely the ordinary public notice, condition, or declaration, and therefore expressly coming within the terms of the section which prevents the company from escaping liability where negligence is proved, as was the case here. The rate charged was not a special rate, but the ordinary rate. The plaintiff had no notice of the limitation of liability. It must be expressly proved that the limitation of liability was brought home to him. The contract itself

does not profess to exempt from liability where there is Argument.
negligence. It is clearly laid down that the statute applies as well to limitation of liability as to restriction from liability: *Vogel v. Grand Trunk R. W. Co.*, 2 O. R. 197; 10 A. R. 162; 11 S. C. R. 612; *Bate v. Canadian Pacific R. W. Co.*, 14 O. R. 625; 15 A. R. 388; 18 S. C. R. 697; *Fitzgerald v. Grand Trunk R. W. Co.*, 4 A. R. 601; 5 S. C. R. 204; *Hart v. Pennsylvania R. W. Co.*, 112 U. S. R. 332. The use of the words "regular trains," in the 51 Vic. does not assist the defendants. The object was to prevent the application of the section to special trains chartered by the shipper. Here the train was an ordinary freight train, and nothing can be made of the argument that the car used was a separate car from that in which goods are ordinarily carried. The fact also of horses not being carried before the introduction of railways, furnishes no answer. The law applies to all goods carried without any distinction, and as horses can be suitably carried by railways, the responsibility of railways as carriers applies. The very object of the section was to prevent companies from doing what the defendants are attempting to do here. The defendants' agent knew that the horse was not an ordinary horse, but a racehorse, and so of special value. The plaintiff told the agent he had a good horse and wanted a good car, and he shipped with the horse at the same time racing paraphernalia such as a sulky, blankets, etc., shewing it was a racehorse. The agent did not ask the value of the horse, or place any value on him, and the plaintiff should not be bound by the statement of value made in the condition of which he had no notice. The damages are in no way excessive. The certificate now attempted to be put in cannot be received. The defendants had knowledge of the existence of the certificate before the trial, and if they intended to rely on it they should have put it in and have given the plaintiff an opportunity of explaining it. No importance can be attached to the certificate. There was no intention thereby to fix the value of the horse.

Judgment. 24th June, 1893. ROSE, J. :—

Rose, J.

It seems to me that this case must be decided on the principles laid down in *Vogel v. Grand Trunk R. W. Co.*, 11 S.C. R. 612; *Bate v. Canadian Pacific R. W. Co.*, 15 A. R. 388, and *McMillan v. Grand Trunk R. W. Co.*, 15 A. R. 14. If I apprehend the decisions in these cases correctly, they are as follows: 1. By the case of *Vogel v. Grand Trunk R. W. Co.*, it was decided that "goods," as found in the statute referred to, included horses; 2. That "notice, condition, or declaration," included contracts in writing signed by the parties or by the shipper in which is found any notice, condition, or declaration, freeing the company from liability; 3. That a railway company subject to the provisions of the statute could not contract itself out of liability.

By the case of *Bate v. Canadian Pacific R. W. Co.*, it was held in the Court of Appeal on the facts that there was no negligence shewn; 2. That the plaintiff had, by accepting and signing the ticket with the conditions endorsed thereon, bound herself by its terms; and, 3. That by such terms she was precluded from recovering more than \$100. Mr. Justice Burton dissented on the ground that no contract had been proven, and the delivery of the ticket with the conditions amounting to a proposal merely, did not until brought to the notice of the plaintiff, amount to a contract. This view was adopted by the Supreme Court, 18 S. C. R. 697; that Court also holding that negligence had been shewn.

I take it, therefore, that the decision of the Court of Appeal as to the power of the company to limit its liability to \$100, stands unreversed and is binding upon us.

The case of *McMillan v. Grand Trunk R. W. Co.*, is of value in this case only as shewing that on the course taken at the trial no question is before us as to what was the contract between the parties, but the case of *Bate v. Canadian Pacific R. W. Co.*, also shews that.

Here the plaintiff put in the writing signed by himself.

The learned Judge rejected evidence to shew that the contract was not evidenced by the writing, ruling as follows: "In the absence of any allegation or proof of fraud, coercion, or imposition on the mere statement that the plaintiff signed a contract, or whatever the paper amounts to, in ignorance of its contents, I do not think I could accept the the evidence which is tendered."

Judgment.

Rose, J.

The case went to the jury to contingently assess the damages or rather find the value of the horse, and no motion has been made by the plaintiff against the ruling of the learned Judge nor is a new trial asked for by the plaintiff on any ground.

It is also clear on the evidence that by the contract in question, the plaintiff obtained carriage for his horse at a special or less rate by reason of the conditions named than if he had tendered the horse for carriage refusing to accede to such terms or conditions.

Therefore, as "goods" includes horses and "notice, condition, or declaration" include a special contract; and the company, though not permitted to contract itself out of all liability, may contract to limit its liability as to amount of loss, and as here the horse was carried under such a contract and as negligence has been admitted, I am of the opinion that judgment must be entered for the defendant dismissing the plaintiff's action with costs.

I have endeavoured in this case to give the result of the decisions as I understood them; but in view of the fact that I dissented from the other members of the Court in the *Bate Case*, and of the conflict of judicial opinions in the cases to which I have referred, I desire to state the view I have taken as to the proper construction of the statute, and to which I should give effect, were I not governed by the decisions in the cases above cited.

I dissented in *Bate v. Canadian Pacific R. W. Co.*, on two grounds, thinking: 1. That there was evidence of negligence; and 2. That, if under the decision in the *Vogel Case*, a company could not by special contract free itself from liability in cases of negligence—it could not by special contract limit its liability.

Judgment.

Rose, J.

The statute, now 51 Vic. ch. 29, sec. 246 (D.), deals with passengers and goods taken, etc., "on the due payment of the toll, freight, or fare lawfully payable therefor." The company is required to take, transport, and discharge passengers and goods on such payment, but not otherwise. If any one wishes to have transport, say, without payment of any toll, it is clear the company would not be bound to accede to such wish, and if it agreed so to do on condition of freedom from all liability, even when the damages arise from negligence, it seems quite manifest that such a contract would not be within the statute, nor would it be governed by it. It seems to me equally clear that if the company agree to carry for a special rate under conditions limiting its liability, the rate being less than would be charged without the benefit of such conditions, such contract would be also without the statute and not governed by it.

But if it be law that no special contract at a reduced rate can be entered into relieving the company from any action for negligence, which, in my opinion, means any liability for damage arising from negligence, then I remain of the opinion expressed in the *Bate v. Canadian Pacific R. W. Co.*, that the company cannot be relieved by contract from liability for a portion of the damage.

To avoid repetition, I refer to what I said in the *Bate v. Canadian Pacific R. W. Co.*, at p. 636.

MACMAHON, J. :—

The defendant company admits it is liable by reason of its negligence, but says by the terms of the contract its liability is limited to \$100. So the questions to be considered, are: (1) has there been a contract entered into by the plaintiff by which he agreed that the company's liability should be limited; and (2), can the defendant company contract so as to limit its liability, having regard to the provisions of 51 Vic. ch. 29, sec. 246, sub-sec. 3 (D.)?

As to the first point, whether the document signed by the plaintiff and the defendants' agent, is a special con-

tract, or, as urged by Mr. Collier, a mere "notice, condition, or declaration" by the railway company, referred to in the above sub-section, and therefore not relieving the company from or limiting its liability. The very wording of the document shews it to be a contract between the railway company and the plaintiff. It is headed "Live Stock Transportation Contract." The horse is to be transported over the Grand Trunk Railway and delivered at St. Catharines' station, "at the special rate of seven 20/100 dollars *under the terms of this contract*. And in consideration of said agreement to transport at *said special rate*, it is hereby mutually agreed by and between the parties hereto," etc. And also: "It is hereby further agreed that the Grand Trunk Railway Company shall not be liable for an amount exceeding the values above mentioned for each or any animal transported." That is: The plaintiff contracts that the railway company shall not be liable for any sum in excess of the value mentioned if the company transports his horse at the special rate agreed upon.

Judgment.
MacMahon,
J.

All controversy as to whether the agreement should be considered a special contract, is set at rest by *Simons v. Great North Western R. W. Co.*, 18 C. B. 805, and the judgment of Burton, J., in *Vogel v. Grand Trunk R. W. Co.*, 10 A. R. 162. at p. 171; and of Strong, J., in the same case, 11 S. C. R. 612, p. 630.

The fact however of a "special rate" having been mentioned in the contract, does not necessarily make it such. If it was a rate common to all for that class of freight, then it would not be a "special rate."

The company has power under the Railway Act, section 90, sub-sec. (o), to "Take, transport, carry, and convey persons and goods on the railway, regulate the time and manner in which the same shall be transported, and the tolls and compensation to be paid therefor and receive such tolls and compensation."

In the exhibit put in by the plaintiff at the trial containing the "Canadian Joint Freight Classification," at p.

Judgment. 27 thereof, there is this provision and classification as to the carriage of animals: "In less than car loads, horses, mules, etc. One animal 2,000 pounds," *i. e.*, one such animal is taken as first class freight. And on page 28: "Above weights and rates are based upon and intended for animals of *ordinary value only*. Racehorses and other valuable animals will be carried *at the same weights and rates* on condition that shipper sign a written agreement as follows: "At owner's risk of loss or damage arising from any cause whatever. This must be written on the face of the consignment, note and receipt."

MacMahon,
J.

By the tariff, racehorses are not to be carried at the rates for ordinary horses. For that class of freight an extra rate must be paid. Or, if the shipper desires, he may, instead of paying such extra rate for the transportation of a racehorse, place on such horse a value equal to that of an ordinary animal, and the railway company will carry at the rate which they would charge for such ordinary animal.

It was urged that this was not a "special rate," as it was a rate common to all. It is true it is a rate common to all for the carriage of an ordinary horse. But it is not a rate for the carriage of a racehorse, and becomes a "special rate" to the shipper for the carriage of such race horse by reason of his agreeing to limit the liability of the company, in the event of the horse being killed, to the agreed value of an ordinary animal—namely, \$100.

As to the second point—whether the railway company can contract so as to avoid all liability in case of loss resulting from negligence, there is much diversity of opinion. In this country in *Vogel v. Grand Trunk R. W. Co.*, 2 O. R. 197, where the company sought to free itself from liability under a shipping bill, containing a condition which provided that the live stock shipped by the plaintiff was to be carried at the owner's risk, the trial Judge directed judgment to be entered for the defendants. The Queen's Bench Divisional Court reversed that judgment, holding that the defendants could not escape liabi-

lity by their conditions, because, as stated in the judgment, their liability was expressly provided for by the clause in the then Railway Act, which is identical in its terms with 51 Vic. ch. 29, sec. 246, sub-sec. 3 (D.).

Judgment.
MacMahon,
J.

The case being taken to the Court of Appeal (10 A. R. 162), Morrison and Osler, JJ.A., held that the company could not by any special contract relieve itself against liability for negligence. Burton, J. A., held that the company was not prevented by the terms of the Act of Parliament from making a special contract exempting itself from liability, even in cases of negligence on their part. On this point, upon reaching the Supreme Court (11 S. C. R. 612), the majority of the Court, Ritchie, C. J., Fournier, and Henry, JJ., supported the judgment of the Queen's Bench Divisional Court in holding that the company could not avail itself of the stipulation freeing itself from liability when the loss occurred through the negligence of themselves or their servants; while Strong and Taschereau, JJ., held that the words "notice, condition, or declaration" in the statute, contemplated public or general notices, and do not prevent a company from entering into a special contract to protect itself from liability.

In *Bate v. Canadian Pacific R. W. Co.*, 14 O. R. 625, the plaintiff obtained a return ticket at a reduced rate, which had a condition limiting the company's liability for loss of baggage to \$100. This she signed at the request of the company's agent, who told her her signature was required for the purpose of identification, as the ticket was not transferrable. The majority of the Court (Cameron, C. J., and Galt, J.), held that the railway company might, by special contract, stipulate that its liability should be limited. Mr. Justice Rose was opinion that under *Vogel v. Grand Trunk R. W. Co.*, the limitation as to liability could not avail to the company. Hagarty, C. J., Patterson and Osler, JJ. A., when the *Bate Case* was before the Court of Appeal (15 A. R. 388), held that by the contract assented to by the plaintiff's signing the ticket,

Judgment.
MacMahon,
J.

the liability of the company for loss was limited to \$100. Burton, J. A., held that until the condition on the ticket limiting the company's liability had been brought to the notice of the plaintiff, there was no agreement on her part to accept a ticket with a limitation of the liability of the company; and that the finding of the jury had negatived such a contract. The Supreme Court in that case held, (18 S. C. R. 697)—agreeing with Burton, J. A.,—that the special conditions printed on the ticket not having been brought to the notice of the plaintiff, she was not bound by them and could recover her loss from the company.

We were also referred to *Anderson v. Canadian Pacific R. W. Co.*, 17 O. R. 747, and 17 A. R. 480. But in that case there was no contract limiting the liability.

It is unquestionable, that at common law carriers could enter into agreements with those who entrusted goods to them for carriage, whereby they relieved themselves from their common law liability as insurers. Mr. Justice Cresswell in delivering the judgment of the Court in *Austin v. Manchester, etc. R. W. Co.*, 10 C. B. 454, at p. 473, after referring to the notices published by common carriers with a view to limiting their responsibility, quotes from Story on Bailments (9th ed.), sec. 549, where the author says: "The right, however, of making such qualified acceptances by common carriers seems to have been asserted in early times. Lord Coke declared it in a note to *Southcote's Case*, 2 Co., p. 487, pt. IV., 83b, 84; and it was admitted in *Morse v. Slue*, 1 Vent. 238. It is now fully recognized and settled beyond any reasonable doubt in England. For this assertion he cites a number of authorities, and we think he has drawn a correct conclusion from them."

The first Carrier's Act (11 Geo. IV. & 1 Wm. IV., ch. 68), which came into force on 1st September, 1830, provided (section 4) that "no public notice or declaration * * shall be deemed or construed to limit or in any wise affect the liability at common law" of any carrier. And

(section 6) nothing in the Act is "to annul or in any wise affect any special contract between such * * common carrier and any other parties, for the conveyance of goods and merchandise."

Judgment.
MacMahon,
J.

The statute was aimed at and confined to notices addressed to the public in general; but in almost every case where such public notice was relied upon by the carrier a contention arose as to whether the notice had been brought home to the consignor or person delivering the goods to be carried.

It was, however, held that the statute had no application where a notice had been received by such consignor so as to form the basis of a special contract with him. See the judgment of Coleridge, J., in *Walker v. York, and North Midland R. W. Co.*, 2 E. & B. 750, at p. 762, where he says: "The Legislature by section 4, says they (common carriers) shall not limit their liability by any 'public notice or declaration.' But by section 6, it goes on to say that nothing shall affect any special contract. The Legislature says nothing as to the mode in which such a special contract shall be made: it is not required to be in writing or signed; nor is there any other formal requisite; so that in every case it must be a question of fact whether there was such a contract. In the present case, the notice was a public notice: but a copy was sent to the plaintiff, and might form the basis of a special contract. I think that, when he afterwards brought his goods and sent them at the reduced rates, it was sufficient evidence that he assented to the terms."

And Blackburn, J., (now Lord Blackburn) in answering the questions submitted by the House of Lords to the Judges in *Peek v. North Staffordshire R. W. Co.*, 10 H. L. 473, at p. 494, replied, that the cases decided between the coming into force of the 11 Geo. IV. and the year 1854, when the Railway and Canal Traffic Act was passed, established that a carrier might by a special notice make a contract limiting his liability even in cases of gross negligence, misconduct, or fraud on the part of his servants.

Judgment.

MacMahon,
J.

After the introduction of railways, and in consequence of the companies imposing conditions designed in many cases to limit and in some instances enabling them thereunder to set up a denial of all liability for loss or damage to goods delivered to them to be carried, the Railway and Canal Traffic Act was passed in 1854 (17 & 18 Vic. ch. 31), the seventh section of which provides that the companies should be liable for any loss, etc., to horses, goods, etc., notwithstanding any notice, condition, or declaration made or given by any such company. It then provided nothing should prevent the companies from making such conditions for the forwarding, etc., of said animals, goods, etc., as shall be adjudged by the Court or Judge to be just and reasonable. The fourth proviso to the section is: "Provided also, that no special contract between such company and any other party respecting the receiving, forwarding, or delivering of any animals, * * shall be binding upon or affect such party unless the same be signed by him or the person delivering such animals, * * for carriage."

The words "notice, condition, or declaration," in our Act, were evidently taken from the English Act. There has been—from its conjunction with the other words—some divergence in judicial opinion as to the meaning which should be attached to the word "condition." It has been decided, however, that a "condition" upon which goods are to be carried, can only have effect when put in writing, and signed, and is just and reasonable. Or as said in the head-note to *Simons v. Great Western R. W. Co.*, 18 C. B. 805: "The seventh section of the 'Railway, etc., Act' does not prevent a railway company from making a special contract as to the terms upon which they will carry goods, provided such contract be 'just and reasonable,' and signed by the party sending the goods. And it is for the Court to say, upon the whole matters brought before them, whether or not the 'condition' or 'special contract' is just and reasonable."

The judgment in *Simons v. Great Western R. W. Co.*,

as to the construction to be placed upon the seventh section of the Act, was confirmed by the House of Lords in *Peek v. North Staffordshire R. W. Co.*, 10 H. L. 473.

Judgment.
MacMahon,
J.

In the *Simons Case* the company under the conditions which were signed by the person delivering the goods, gave notice that goods were carried in general on certain terms; and also that for "Goods conveyed at special or mileage rate, * * the company will not be responsible for any risk of stowage, loss, or damage, *however caused*." The Court held the stipulation by the company freeing it from responsibility for loss or damage to goods carried at such special or mileage rate, however caused, was valid.

The judgment in *Simons v. Great Western R. W. Co.*, was fully discussed in *Peek v. North Staffordshire R. W. Co.*, where Blackburn, J., said at p. 512: "To bring a case within this principle (the one above enunciated in the judgment in the *Simons Case*); it must appear that the customer really had an alternative; that he had the power, if he pleased to have sent his goods at the ordinary rates and on the ordinary terms as to liability, and having that option elected to send them otherwise."

He also said at p. 511: "A carrier is bound to carry for reasonable remuneration, and if he offers to do so, but at the same time offers in the alternative to carry on the terms that he shall have no liability at all, and holds forth as an inducement a reduction in the price below that which would be reasonable remuneration for carrying at carrier's risk, or some additional advantage, which he is not bound to give, and does not give to those that employ him with a common law liability, I think a condition thus offered may be reasonable enough. For the terms of a special contract entered into by a person who has the option of employing the carrier on the terms of the contract, or on the terms of his undertaking the common law liability, are necessarily reasonable as regards the person having that option."

The opinion of Cockburn, C. J., in *Peek v. North Staffordshire R. W. Co.*, was in accord with that expressed by Blackburn, J. He said, at p. 559: "It is unnecessary to consider

Judgment. how far, if a company established a two-fold rate of charge,
MacMahon, a higher and lower, and gave the customer the option of pay-
J. ing less than the ordinary freight, on the condition of his
taking all risk upon himself, such a proceeding would be
reasonable. That case is not before your Lordships.
There is nothing here to show that the freight paid by
the plaintiff was not the full rate of charge payable for
commodities of this class."

It must be observed, however, that we are not now
dealing with a case where the carriers are under the terms
of the contract denying their liability arising from their
negligence, as was the case in *Vogel v. Grand Trunk R.
W. Co.*, but with a case where by the contract between
the shipper and the carrier the latter's liability is—in con-
sideration of its carrying a race-horse at a special rate—
limited and fixed at a certain sum, \$100.

Hutchinson on Carriers, 2nd ed., sec. 250, refers to
the distinction which he says is not always observed be-
tween the cases where a carrier stipulates for an exemp-
tion from the effects of the negligence of himself or his
servants, and "those cases obviously different, in which,
for the purpose of determining the shipper's liability for
freight and the carrier's responsibility for damages, the
value of the property is agreed upon."

The text refers to numerous authorities illustrating the
distinction, the principal one being the judgment of the
Supreme Court of the United States, in *Hart v. Pennsyl-
vania R. W. Co.*, 112 U. S. 331, decided in November
1884.

The head note to that case contains the following state-
ment of facts: "H." (the plaintiff) "shipped five horses, and
other property, by a railroad, in one car, under a bill of
lading, signed by him, which stated that the horses were
to be transported upon the following terms and conditions,
which are admitted and accepted by me to be just and
reasonable: First. To pay freight thereon" at the rate speci-
fied, "on the condition that the carrier assumes a liability
on the stock to the extent of the following agreed valuation:

If horses or mules, not exceeding \$200 each. * * If a chartered car on the stock and contents in same, \$1,200 for the car load. But no carrier shall be liable for the acts of the animals themselves, * * nor for loss or damage arising from condition of the animals themselves, which risks being beyond the control of the company, are hereby assumed by the owner and the carrier released therefrom."

Judgment.
MacMahon,
J.

"By the negligence of the railroad company or its servants, one of the horses was killed and the others were injured, and the other property was lost. In a suit to recover the damages, it appeared that the horses were racehorses, and the plaintiff offered to shew damages, based on their value, amounting to over \$25,000. The testimony was excluded, and he had a verdict for \$1,200. On a writ of error, brought by him: Held, (1) The evidence was not admissible, and the valuation and limitation of liability in the bill of lading was just and reasonable and binding on the plaintiff; (2) The terms of the limitation covered a loss through negligence."

In meeting the argument of plaintiff's counsel, "that the bill of lading does not purport to limit the liability of the defendant to the amounts stated in it, in the event of loss through the negligence of the defendant," Mr. Justice Blachford, who delivered the judgment of the Court, said: "We are of opinion that the contract is not susceptible of that construction. The defendant receives the property for transportation on the terms and conditions expressed, which the plaintiff accepts 'as just and reasonable.' He then quotes the paragraph in the contract, "but no carrier shall be liable," etc., and says: "This statement of the fact that the risks from the acts and conditions of the horses are risks beyond the control of the defendant, and are, therefore, assumed by the plaintiff, shews, if more were needed than the other language of the contract, that the risks and liability assumed by the defendant in the remainder of the same paragraph are those not beyond, but within the control of the defendant, and therefore apply to loss through negligence of the defendant."

Judgment.

MacMahon,
J.

The question as to the rate of freight and the assumption by the defendant company of a certain ascertained liability consequent upon payment of such freight is thus dealt with in the judgment at p. 337: "It must be presumed from the terms of the bill of lading, and without any evidence on the subject, and especially in the absence of any evidence to the contrary, that as the rate of freight expressed is stated to be on the condition that the defendant assumes a liability to the extent of the agreed valuation named, the rate of freight is graduated by the valuation. Especially is this so, as the bill of lading is what its heading states it to be, 'a limited liability live stock contract,' and is confined to live stock. Although the horses, being racehorses, may, aside from the bill of lading, have been of greater real value than that specified in it, whatever passed between the parties before the bill of lading was signed was merged in the valuation it fixed; and it is not asserted that the plaintiff named any value greater or less otherwise than as he assented to the value named in the bill of lading, by signing it. The presumption is conclusive that, if the liability had been assumed on a valuation as great as that now alleged, a higher rate of freight would have been charged. The rate of freight is indissolubly bound up with the valuation. If the rate of freight named, was the only one offered by the defendant, it was because it was a rate measured by the valuation expressed. If the valuation was fixed at that expressed, when the real value was larger, it was because the rate of freight named was measured by the low valuation. The plaintiff cannot claim a higher valuation, on the agreed rate of freight."

The "Canadian Joint Freight Classification," and the evidence of John Earls, the general freight agent of the Grand Trunk Railway, go to shew that a person insisting on having a racehorse transported, the shipper would be required to pay an extra charge, and that the local agent has no authority to accept for carriage such a horse until he has communicated with the Head Office as to the rate to be fixed.

The argument was addressed to us that the agent of the railway company must have been aware that they were receiving a racehorse for shipment, the plaintiff having said to the agent, "I have a good horse and I want a good car," and that racing paraphernalia, sulky, blankets, etc., were there, and that the plaintiff was not, when the contract was entered into, asked by the agent the value of the horse, and that as no valuation had been declared, he was not bound by the value stated in the contract.

Judgment.
MacMahon,
J.

A like contention was raised in *Hart v. Pennsylvania R. W. Co.*, which was thus answered with great perspicuity in the judgment at pages 337 and 338: "It is further contended by the plaintiff, that the defendant is forbidden, by public policy, to fix a limit for his liability for a loss by negligence, at an amount less than the actual loss by such negligence. As a minor proposition, a distinction is sought to be drawn between a case where a shipper, on requirement, states the value of the property, and a rate of freight is fixed accordingly, and the present case. It is said, that, while in the former case the shipper may be confined to the value he so fixed, in the event of a loss by negligence, the same rule does not apply to a case where the valuation inserted in the contract is not a valuation previously named by the shipper. But we see no sound reason for this distinction. The valuation named was the agreed valuation; the one on which the minds of the parties met, however it came to be fixed, and the rate of freight was based on that valuation, and was fixed on condition that such was the valuation, and that the liability should go to that extent and no further."

To my mind the contention of the plaintiff in this case that the agent of the railway company must have known it was a racehorse he was shipping, militates against the plaintiff. If the agent knew or suspected it was a racehorse and more valuable than an ordinary animal, that was a reason why a special contract became necessary if it was to be carried at the rate for an ordinary animal. The

Judgment. plaintiff knew he was entering into a special contract
MacMahon, whereby he was agreeing that the company's responsibility
J. was being limited in consideration of the special rate he was obtaining for the transportation; and he remains dumb as to the value of the animal and signs the contract.

There is, I take it, no material difference between the expression "On condition that the carrier assumes a liability on the stock on the following agreed valuation" used in the bill of lading in *Hart v. Pennsylvania R. W. Co.*, and the language used in the transportation contract in this case, namely, "and said company shall in no case be responsible for an amount exceeding one hundred (100) dollars for each or any horse," in so far as limiting the liability of the carriers under the respective contracts is concerned. If so, the plaintiff in consideration of the special rate mentioned in the contract, was agreeing that his horse should be valued at \$100, for which after the loss, he seeks to recover \$5,000.

After stating in *Hart v. Pennsylvania R. W. Co.* that the law of the Supreme Court is, "that a common carrier may by special contract limit his common law liability; but that he cannot stipulate for exemption from the consequences of his own negligence or that of his servants," several cases decided by that Court, are then observed upon, and the judgment then states: "to the views announced in these cases we adhere. But there is not in them any adjudication on the particular question now before us. It may, however, be disposed of on principles which are well established and which do not conflict with any of the rulings of this Court. * * If the shipper is guilty of fraud or imposition, by misrepresenting the nature or value of the article, he destroys his claim to indemnity, because he has attempted to deprive the carrier of the right to be compensated in proportion to the value of the articles and the consequent risk assumed. * * This qualification of the liability of the carrier is reasonable, and is as important as the rule which it qualifies."

According to Robertson's own statement he was misrepresenting the value of the freight to be carried. He says he had a \$5,000 horse; he knew the value he was placing upon it to the company to be only \$100, in order that he might have transportation at a reduced rate; and he now wishes to be indemnified against his own fraud and misrepresentation.

Judgment.
MacMahon,
J.

The judgment in *Hart's Case* then deals at length with the injustice which would result from allowing a shipper to recover a large value for an article which the carrier was induced to take at a low rate of freight on the assertion and agreement that its value is less than that claimed after the loss, and says that the shipper is estopped from saying that the value is greater than that mentioned in the contract.

After citing a number of authorities as containing the rule which the Court considered the proper one in the case, the opinion proceeds: "Applying to the case in hand the proper test to be applied to every limitation of common-law liability of a carrier—its just, reasonable character—we have reached the result indicated. In Great Britain a statute directs this test to be applied by the Courts. The same rule is the proper one to be applied in this country in the absence of any statute. * * The distinct ground of our decision in the case at bar is that where a contract of the kind signed by the shipper is fairly made agreeing on a valuation of the property carried with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations."

Taking the judgment in that case as expressing the common law liability of carriers in the United States, I find it difficult to distinguish between it and the statutory provisions in section 246 of our Railway Act.

Judgment.MacMahon,
J.

The plaintiff in the present action had, on other occasions when shipping, signed these live stock transportation contracts, and as they were signed in duplicate, he is assumed to have been fully aware of the contract he was entering into (*Watkins v. Rymill*, 10 Q. B. D. 178; *McMillan v. Grand Trunk R. W. Co.*, 12 O.R. 103, 112, 113, per Rose, J.); and he put the contract in at the trial as part of his case.

There has not in this country been an adjudication upon the particular point raised here as to the right of a railway company to limit by contract with the shipper the amount for which it would be liable in the event of loss or damage through its negligence, although there have been *dicta* in favour of and against such right. On this point Moss, C. J. A., in *Fitzgerald v. Grand Trunk R. W. Co.*, 4 A. R. 601, at p. 626 said: "As I have already had occasion to point out, where there are two rates, at one of which the carrier was willing to assume his full common law liability as insurer, and at the other of which he only undertook a limited responsibility, the Courts have shewn a disposition to give an indulgent interpretation to conditions."

Cameron, C. J., in *Bate v. Canadian Pacific R. W. Co.*, 14 O. R. 633, thought such right existed, provided there was some advantage accruing to the shipper from a reduced rate. In that opinion, the present Chief Justice of the Common Pleas Division concurred, while Mr. Justice Rose considered that "the provisions of the Act extended to prevent limitation of liability quite as well as to prevent denial of liability."

In *Vogel v. Grand Trunk R. W. Co.*, 10 A. R. 162, Burton, J. A., at p. 171, held that the company was not precluded by the terms of the Act of Parliament from making a special contract exempting themselves from liability, even in the case of negligence on their part. And, as already stated, Strong and Taschereau, JJ., when that case was before the Supreme Court, held the view entertained by Burton, J. A.

With this conflict of judicial opinion existing here, and

having reached a conclusion from the judgment of the Supreme Court of the United States in the *Hart Case*, that there is no difference between the common law liability of carriers as thus expounded, and our statute, I follow that case, and hold that the railway company could and did contract with the plaintiff for the transportation of the horse by which their liability was limited to the \$100 paid into Court.

Judgment.
MacMahon,
J.

Had it not been for the view thus entertained, I should have held that the defendants were entitled to a new trial on the ground that the damages are excessive, the plaintiff having, on the 1st of September, 1891, made a declaration before the United States Consul at Windsor, that the value of the horse was only \$1,500; and in which declaration he states the horse is freely offered for sale to all purchasers in Ontario. A similar declaration was on the following day made by the plaintiff when passing through the customs at Detroit.

The motion should, I think, be absolute, setting aside the judgment directed to be entered for the plaintiff for \$4,900, and to enter judgment for the defendants, dismissing the action with costs. See *Tobin v. McGillis*, in note to *Chick v. Toronto Electric Light Co.*, 12 P. R., 58, at p. 60.

[CHANCERY DIVISION.]

IN RE CITY MUTUAL INSURANCE COMPANY.

STEIFELMEYER'S CASE.

Mutual Insurance Company—Policy—Winding-up—Cancellation—Assessment—R. S. O. ch. 167, sec. 114, sub-sec. 19.

A resolution for the voluntary liquidation of a Mutual Insurance Company under the Ontario Winding-up Act, was adopted at a general meeting on a report of directors, which contained a recommendation that policies be sent in to the liquidator, and that members seek insurance elsewhere. One of the policy holders sent in his policy accordingly, but no notice of actual cancellation was given to him, nor was anything further done in reference to cancellation. Afterwards an assessment was made upon the policy by the directors with the concurrence of the liquidator:—

Held, that the policy had not been cancelled, and the assessment was good.

Statement. THIS was an appeal arising out of the winding-up proceedings of the City Mutual Insurance Company, and was brought by the firm of Steifelmeyer and Schoff, from the order of the Master at London, placing them on the list of contributories of the above company in respect to an assessment alleged to be due by them on a premium note, the amount claimed being \$64.

Winding-up proceedings were first commenced under the Ontario Winding-up Act pursuant to a notice sent to all shareholders on January 6th, 1891, but on June 27th, 1892, an order for winding up under the Dominion Winding-up Act was made on the application of a creditor, and the proceedings were now being carried on under the latter Act.

Most of the material circumstances are set out in the judgment.

On February 13th, 1891, an assessment was made upon premium notes including that of the present appellants, and attempts were made from that time to the spring of 1892, to collect the amounts called for on that assessment in various Division Court actions, but in May, 1892, OSLER, J. A., adjudged the assessment to be invalid.

Thereupon, on May 25th, 1892, a new assessment, being the one now in question, was made, notices being mailed on June 3rd, 1892. Statement.

This appeal was brought on the following grounds:—

1. That the notice of assessment was bad.
2. That the assessment itself was bad.
3. That at the time of making the assessment the directors had no power to make one.
4. That the policy of the appellant was not current within forty-eight days before the making of the assessment.

The matter was argued on June 15th, 1893, before FERGUSON, J.

W. H. P. Clement, for the appellant. Our policy is a three year one, and runs until November, 1893, and the notice purported to assess us to the expiration of the policy, that is, they are assessing into the future, but the Act gives no such power: R. S. O. ch. 167, secs. 67, 113, 122-6; *Victoria Mutual Fire Ins. Co. v. Thomson*, 9 A. R. 620, 628. The resolution of assessment does not shew for what or over what time, or for what losses it is made. The company being in process of winding up, the directors had no power to make an assessment: R. S. O. ch. 183, secs. 6 and 8. There is nothing to shew that the liquidator had requested the directors to make the assessment, and nothing to shew the sanction of it by the company. Section 14 of R. S. O. ch. 183, shews that there must be an absolute liability at the time of the commencement of the winding up. The policy was not current at the time of the assessment. See R. S. O. ch. 167, sec. 151, and 53 Vict. ch. 44, sec. 4, amending R. S. O. ch. 167, sec. 132. The policy was cancelled inasmuch as it was sent in pursuant to the notice of the report of the general meeting. This amounted to a discharge under R. S. O. ch. 167, sec. 51. There was no right to assess for losses after the sending in of the policy pursuant to the notice.

Argument.

Hoyles, Q. C., for the liquidator. The appellants' policy cannot be cancelled inferentially. It can only be cancelled by resolution duly passed; unless the appellants can shew that they have been released, they continue bound and liable to the creditors of the company. [FERGUSON, J. Here there was a resolution adopted at a general meeting of the company; does not that bind the company?] There was no resolution authorizing the cancellation of the policy of the appellants. [FERGUSON, J. The report of the directors recommended that the policy holders should send in their policies and insure elsewhere; this was adopted, and notice sent to the appellants.] There was no resolution to carry the recommendation of the report into effect. The notice of assessment is good. It complies with the Act. R. S. O. ch. 167, sec. 126, points out what the notice is to contain. The notice complies with this section. *Victoria Mutual Ins. Co. v. Thomson*, 9 A. R., at p. 629, shews that the company had power to make the assessment for all losses as they occurred. The winding up is under the Dominion Act, and we are not now embarrassed with any question arising on the original assessment. It is immaterial whether the directors had power to make the assessment or not. Here the whole amount of appellants' note is required; and if, as contended by the appellants, there was no power to make the assessment, the appellants would go scot free. R. S. O. ch. 167, sec. 67, exempts members from liability beyond the amount unpaid on their notes. The liquidator is authorized to say who are liable, and it would make no difference if the directors had made no assessment. The question here is simply whether the appellants were properly placed on the list of contributories. How they are to be compelled to pay is another matter which does not arise here. A member of a mutual company stands in very much the same position as a shareholder: *Victoria Mutual Fire Ins. Co. v. Thomson*, 9 A. R. 620; *Merritt v. The Niagara Mutual Fire Ins. Co.*, 18 U. C. R. 529; May on Law of Insurance, 3rd ed., secs. 67a, 548, 549; R. S. O. ch. 167, secs. 68, 114, sub-

sec. 19. The liquidator having sent out the notices must be taken to have sanctioned the assessment by the directors as provided by R. S. O. ch. 183, sec. 8, sub-sec. 6. There was no cancellation of the policy, nor did it come to an end. The notice of assessment was and is good. It gives the period for which the assessment is made, namely, the whole period of the policy. All the money on the notes was required, and the winding up being under the Dominion Act, the liquidator could make out a list of contributories and make calls for the amounts required. Argument.

Clement, in reply. The judgment of OSLER, J. A., was given pending the winding up. He held the notice bad, and if so, then the new notice may also be considered and set aside. I refer to *Campbell v. Adams*, 38 Barbour (N. Y.) 132. The liabilities in respect of which persons may be made liable under a winding-up order, must be absolute liabilities, not contingent liabilities. As to cancellation of policies, see R. S. O. ch. 167, sec. 51. The company has not reinsured—it has not returned the appellants' policy, but has kept it ever since it was handed over to them pursuant to the notice. [FERGUSON, J. That clause providing for reinsurance has nothing to do with the case; that applies to companies withdrawing from business in this Province, and is a condition of the company getting back its deposit from the Government.] R. S. O. ch. 167, secs. 151, 152, are *in pari naturâ* and contemplate reinsurance or winding up. Even if these sections do not apply, it is not open to the company to set up the want of a resolution to carry out the directors' report.

June 20th, 1893. FERGUSON, J.:—

The learned Master at London made an order placing Steifelmeyer on the list of contributories. The liability, or alleged liability is the balance remaining unpaid upon a premium note. The appeal is from this order of the Master. The insurance was effected and the policy issued

Judgment. on the 4th of November, 1890. A part of the amount Ferguson, J. mentioned in the premium note was then paid. On January 27th, 1891, an annual general meeting of the members of the company was held. At this meeting was received a report of the directors of the company stating that on the 6th of January, 1891, the board of directors had, with great reluctance, decided to place the company in voluntary liquidation in order to wind up the business, and with this in view have named Mr. J. B. Vining as liquidator, and had ordered that the notices required as necessary by the statute should be given to the Provincial Treasurer and the Inspector of Insurance, and also in the *Ontario Gazette*, to the public. The report then gave a brief review of the facts connected with the history of the company professing to shew the assets and the liabilities. It then said: "This should enable the liquidator to pay off all claims and to return the unearned premiums to cash insurers without great expense to the general members;" and then said: "In the meantime your board would recommend that policies be sent in to the liquidator, and that members should seek insurance elsewhere."

This report was signed by the president, Mr. Cowan, and countersigned by Mr. Vining, the secretary of the company. Mr. Vining being the gentleman who was chosen and named as liquidator, and who, although the proceedings are now being carried on under the provisions of the Dominion Act, is still the liquidator.

At the meeting (of the 27th of January, 1891) a resolution was passed confirming the action of the president and directors as stated in the report, and appointing a special general meeting to be held on the 15th of February, 1891, for the purpose of passing an extraordinary resolution required by the Act for the purpose of the winding up.

A copy of this resolution and the report of the board of directors, both contained in one printed document, which stated also such other proceedings as took place at the meeting of the 27th January, 1891, was sent to Steifel-meyer, and, as was said to each of the policy holders, and

Steifelmeyer sent in his policy, which act was said to be in ^{Judgment.} pursuance of the recommendation contained in the report ^{Ferguson, J.} of the board of directors above mentioned. It is conceded on all hands that the assets of the company are insufficient by a large amount to meet the liabilities. A number of contentions were made on behalf of Steifelmeyer, amongst which was the important one that the policy had been cancelled or terminated by reason of the recommendation contained in the report before mentioned by the board, and his sending in the policy, and that according to the provisions of sec. 113 of the Act, ch. 167, he was liable in respect of losses, etc., up to the time of such cancellation or termination of the policy, and that so far as he had any concern sufficient had been paid by him to meet his proper proportion of all such losses, etc.

In this contention the provisions of sub-sec. 19 of sec. 114 of the Act, R. S. O. ch. 167, were amongst other things relied on.

It is clear, I think, that there was not a withdrawal under the provisions of section 68, and there was not any act done professedly under the provisions of sub-sec. 19 of sec. 114. There was simply the recommendation contained in the report of the directors, and as is said the sending in of the policy, the company and the liquidator afterwards, as appears by the notice of assessment and circular of the 25th of May, 1892, and otherwise, believing that the policies, and amongst others, this one, were considered in force until their expiration by effluxion of time.

In May on Insurance, 3rd ed., sec. 67*a*, it is said that after a mutual company has become in fact insolvent, though perhaps not yet declared so, it is impossible for a member by agreement with the company to have his policy cancelled and so escape future liability, and that a member of a mutual company stands in the position of a stockholder. At section 548 of the same work it is said that each person insured becomes a member of the body corporate clothed with the rights and subject to the

Judgment. liabilities of a stockholder, and that he is at once insurer and insured.
Ferguson, J.

Here, however, there was no agreement whatever between the company and Steifelmeyer respecting a cancellation or termination of the policy, nor was there any specific notice of cancellation or termination of the policy.

In May on Insurance, section 67*d*, it is said that to effect a cancellation the notice must reach the assured in the shape of an unconditional demand for cancellation, not a mere expression of desire. The notice must be that the policy is cancelled, not that it *will be* cancelled. There was no such notice here, nor is the case such as arose in *Hopkins v. The Phoenix Ins. Co.*, 19 Ins. L. J. 90 (Iowa), referred to in May on Insurance, sec. 67*a*, where it was held that the evidence was such as to justify the finding of a cancellation, for there the notice was that the company had determined to cancel.

After having bestowed some consideration upon the subject, and the facts presented here, I am unable to arrive at the conclusion that this policy was cancelled or terminated as contended on behalf of Steifelmeyer. This contention was in form that the policy was not current within forty days before the assessment in question was made on May 25th, 1892, and I think the contention fails.

The contentions that the notice of assessment was bad, and that the assessment itself was bad were the subject of much argument, at the close of which I expressed, provisionally, an opinion against the contentions giving some reasons for the view that I entertained. This opinion remains unchanged, and my conclusion is against Steifelmeyer as to these contentions.

As to the contention that the directors had, at the time of making the assessment, no power to make it, I think it a fair finding on the evidence that the directors made the assessment with the due concurrence of the liquidator, and it does not appear that there were inspectors who should have concurred in it with the directors.

On the whole case I am of the opinion that the decision ^{Judgment.} of the learned Master should be upheld and affirmed, and ^{Ferguson, J.} the appeal dismissed, but I think there is sufficient reason for saying that there should be no costs of the appeal.

Appeal dismissed without costs.

A. H. F. L.

[CHANCERY DIVISION.]

THE WAKEFIELD RATTAN COMPANY,

PETITIONERS.

v.

THE HAMILTON WHIP COMPANY (LIMITED),

RESPONDENTS.

*Company—Voluntary Assignment by—Application for Winding-up Order
—Wishes of Creditors—R. S. C. ch. 129, sec. 9—Discretion of Court.*

Section 9 of the Dominion Winding-up Act gives a wide discretionary power to the Court to grant or refuse a winding-up order; and where upon an application for such an order, it appeared that the company had previously made a voluntary assignment for the benefit of creditors, and that it was the desire of the great majority in number and value of the creditors that liquidation should be proceeded with under the assignment, the application was refused.

THIS was an application by the petitioners as creditors, ^{Statement.} for a winding-up order against the respondents.

The petitioners alleged, amongst other matters, an admission by the president of the respondent company that it was unable to pay its debts in full, and that it had made an assignment for the benefit of creditors.

The petition was argued on September 12th, 1893, before BOYD, C.

On the argument, affidavits were filed on behalf of the respondent company, admitting the assignment and shewing the proceedings at a meeting of the creditors and

Argument. alleging that it was the desire of a large majority of the said creditors that the company should be wound up under the assignment rather than by compulsory winding-up proceedings.

Carscallen, Q. C., appeared for the petitioning creditors, and contended that under the circumstances the petitioners were entitled, as a matter of right, to the order.

F. Fitzgerald, for the respondents. The Court will have regard to the instructions of the majority of creditors: Emden's Practice of Winding-up Companies, 2nd ed., pp. 9, 49. The Court has complete discretion, R. S. C. ch. 129, sec. 9, Emden, pp. 19, 50.

J. J. Scott, for other creditors. The winding-up under the assignment will be less expensive and more satisfactory to the wishes of the majority of creditors.

September 12th, 1893. BOYD, C. :—

This is a case for exercising the wide discretionary power given by section 9 of the Winding-up Act, R. S. C. ch. 129, upon the presentation of a petition to wind up a company.

The company before the filing or service of the petition, made a voluntary assignment for the benefit of creditors; the assignee has taken the estate and assets in hand, and is proceeding to the satisfaction of the great majority in number and value of the creditors.

This controlling body of creditors do not desire that compulsory proceedings should be taken under the Act, with a view to greater economy and expedition under the voluntary assignment.

I give effect to their wishes and allow these voluntary proceedings to be prosecuted, at the same time adjourning the present application, which may be renewed if any exigency arises to justify the intervention of the Court. The costs already incurred by the petitioning creditors may be added to their claim.

[CHANCERY DIVISION.]

OWEN SOUND BUILDING AND SAVINGS SOCIETY V. MEIR.

Defamation—Libel—Impugning the Validity of Election of Directors of a Corporation—Libel on a Corporation.

The defendant published of the directors of the plaintiffs, an incorporated Building Society, in a newspaper, a notice, stating amongst other matters, that "certain persons representing themselves to be directors of the Society had been self-appointed by the most despicable, foul and fraudulent means, and in consequence, all business transacted by them * * is wholly and entirely contrary to rules and regulations and law" :—

Held, that the paragraph was capable of the meaning attributed to it, namely, that the business of the Society was being illegally transacted, and as such, it was defamatory of the plaintiffs.

THIS was an action of libel and slander brought by the Statement. plaintiffs, who were an incorporated society, under the Act respecting Building Societies, R. S. O. ch. 169.

The defendant had been one of the promoters of the plaintiffs, and for a long time managing director, but was on June 15th, 1892, removed from his position as manager.

The plaintiffs alleged in their statement of claim that the defendant, with intent to injure the business reputation of the plaintiffs' society, destroy their credit, cause investors to withdraw from it and deter intending investors, and harass, hinder and annoy the plaintiffs in transacting their business, and collecting moneys owing to them, falsely and maliciously wrote and published, on October 11th and 13th, 1892, in the form of a notice intended for publication in certain Owen Sound newspapers, the following :

NOTICE.

"I hereby notify all persons whom it may concern that certain persons representing themselves to be the directors of the Owen Sound Building and Savings Society, are taking proceedings to sell the properties of borrowers who are somewhat in arrears in their payments to the society, and that any such sales or conveyances, transfers of title or transfers of shares of stock in the society made or sanctioned by them will be irregular, illegal, null and void, the

Statement. said persons assuming to be directors, being self-appointed by the most despicable, foul and fraudulent means, and in consequence all business transacted by them since and including the first Monday in August of the present year, is wholly and entirely contrary to rules and regulations, and law."

GEORGE MEIR,
Late Manager and Director,
O. S. B. and S. Society.

N.B.—This is Chapter No. 1.

Each of the newspapers applied to, however, refused to publish the above notice.

The plaintiffs then alleged that on October 11th, 1892, the defendant with similar intent, published in the "Owen Sound Sun" in the form of an advertisement the following notice:

NOTICE.

"I hereby notify all whom it may concern that certain persons representing themselves to be directors of the Owen Sound Building and Savings Society, are taking proceedings to sell the properties of borrowers who are somewhat in arrears in their payments to the society, and that such sales or conveyances, or transfers of title, or transfers of shares of stock in the society, made or sanctioned by them will be irregular, the said persons assuming the position of directors being self-appointed, and, in consequence, all business transacted by them on behalf of the society, since and including the first Monday in August of the present year, is wholly and entirely contrary to rules and regulations, and law."

GEORGE MEIR,
Late Manager and Director,
O. S. B. and S. Society.

Dated Owen Sound, 11th Oct., 1892.

The plaintiffs further set up certain verbal slanders, and claimed \$10,000 damages.

In his statement of defence, the defendant admitted the publication of the notice secondly above set out, but denied

any defamatory meaning, and alleged that he published it Statement.
in discharge of the duty which he believed he owed to the shareholders and borrowers of the plaintiffs' society, a large proportion of whom had become shareholders and borrowers through his personal solicitations and representations, and, therefore, he claimed that the notice was privileged. He also denied that the plaintiffs had suffered any injury in their credit or business by reason of the notice.

The action was tried before ROSE, J., and a jury, at Owen Sound, on March 10th, 1893.

At the opening of the case the defendant's counsel applied for and obtained leave to reinstate a plea of justification as to the notice secondly above set out, which plea had been previously struck out in Chambers, and an appeal from the order striking it out enlarged to be disposed of at the trial.

The learned Judge, after hearing the evidence, dismissed so much of the action as related to the alleged slanders, and on the subject of the libels, directed the jury that the plea of justification was not proved, and in the course of his charge stated :

"I will repeat in a sentence or two, the rule which you will act upon to determine whether this article was libellous. If you think these statements were not such as would injure this company in the minds of anyone desiring to transact any sort of business with it of the nature or character which you will readily understand such a company would transact; if you think it would not hurt its financial standing, depreciate the value of its property, prevent its doing business, injure it financially, then you will say the article was not defamatory, was not libellous, and you will give a verdict for the defendant. But if, on the other hand, you think the article was one calculated to injure this company, then you will say what damages you will give."

The trial resulted in a verdict for the plaintiffs, with \$5.00 damages.

Argument.

The defendant now moved by way of appeal before the Divisional Court, and the motion was argued on May 10th, 1893, before BOYD, C., and FERGUSON, J.

Aylesworth, Q.C., for the defendant. The document complained of is not, as we contend, a libel. The question is, is the document more than slander of title? Can it be said to be defamation of the plaintiffs' company in the way of their business or trade? The Judge must always say whether the words charged are capable of a defamatory meaning; it is for the jury to say whether they have a defamatory meaning. They proved here no damage. They did not prove that any sales had been prevented by the alleged libel. The allegations are not about the corporation, but solely about the directors: *Odger's Law of Libel and Slander*, 2nd ed., ch. 3, p. 93; *Evans v. Harlow*, 5 Q. B. 624; *Mayor, etc., of Manchester v. Williams*, [1891] 1 Q. B. 94; *The Metropolitan Saloon Omnibus Co. v. Hawkins*, 4 H. & N. 87. If the defendant's course has injured the property of the plaintiffs he is liable, but they have not alleged or proved any such thing: *Odger's Law of Libel and Slander*, 2nd ed., at pp. 415-6; *Williams v. Beaumont*, 10 Bing. 260, 3 Mann. & S. 705; *Trenton Ins. Co. v. Perrine*, 3 Zab. (N.J.) 402. [BOYD, C.—Was it not for the jury to pass upon whether this document went to the company or only to the directors.] It never was left to the jury in that way. The plaintiffs are not a trading corporation: *Mulkern v. Ward*, L. R. 13 Eq., at p. 622; *Brownlie v. Russell*, 8 App. Cas., at p. 248. It is not an ordinary building society, or a society incorporated for the sake of gain, but a corporation bringing together men who lend to one another. It is incorporated under R. S. O. ch. 169. It lends to its own members upon the security of the shares they subscribe for. [BOYD, C.—Would it not be regarded as a trading corporation within the bankruptcy law?] Perhaps so. Suppose there was a firm, who have a manager, and some one publishes that their manager had no right to manage the business. Would this be a libel

upon the employer? This is only slander of title: *Malachy* Argument. v. *Soper*, 3 Bing. N. C. 371.

Masson, Q.C., for the plaintiffs. You cannot distinguish between the directorate, through whom alone a company can do business, and the company. The libel affects the company's power to do business: *Townshend on Slander and Libel*, sec. 263; *Mutual Reserve Fund v. S.*, 50 N. Y. 460; *Ratcliffe v. Evans*, [1892] 2 Q. B. 524; *Hargrave v. LeBreton*, 4 Burr. 2422.

September 9th, 1893. BOYD, C.:—

The article complained of as libellous reads thus: [setting it out].

It is argued that this contains no libel on the company, but is only an imputation on the conduct of certain directors. The defendant did not demur, but pleaded that the article had not a defamatory sense as affecting the company. This was an issue to be passed upon by the jury, and they have found against the defendant. I agree with the construction placed upon the article by the trial Judge, that it might well be read so as to reflect disastrously upon the credit and standing of the company. Indeed, it appears to me, that the obvious meaning of the words includes all the directorate as an usurping body, for the words used do not limit reprobation to certain members of that board. Had the defendant named those alleged by him to be self-elected, it could be more cogently argued that the corporation was not defamed. But the very vagueness of the charge (assuming that only some were meant) would the more alarm the public; for who could tell what directors were acting illegally? Who could tell which director was to be avoided? Consequently, the only safe way was to avoid dealing with the whole concern.

Passing from this, the only other ground urged was that justification was proved. The truth of certain preliminary statements printed may be regarded as proved, *i. e.*, that some directors were self-elected by means of a discredit-

Judgment.

Boyd, C.

able manœuvre detailed in the evidence, but that does not go far enough to exonerate the defendant from his statement that all business transacted by them for the society was contrary to law, *i. e.*, null and void. The course pursued was one which the members and the corporation could condone, and though the directors were liable to be displaced if attacked, the failure to do so did not disorganize the company, or unfit it for the transaction of business which would be for all purposes valid as regards the outside public. But the public are cautioned against dealing with the company because all business transacted since and including the first Monday in August, is wholly and entirely contrary to rules and regulations and law. The fair meaning of that is, that it would be invalid, so that persons would not be safe in buying or lending, or otherwise dealing with the company. This contention is not justified, and in this lies the sting of the whole advertisement.

I agree then with the result of the learned Judge's ruling that the publication as a whole was not proved to be true.

The judgment is therefore affirmed with costs.

FERGUSON, J. :—

I agree in the conclusion arrived at by the Chancellor. I am unable to see that the publication complained of was a mere slander of title as was contended, or that it was merely defamatory, if defamatory at all, of the persons called "certain persons representing themselves to be directors." The publication read by one who had not heard or read the evidence, and who did not know anything of the actual facts alluded to in it, would, I think, be fairly taken to mean that all the acting directors of the society were persons representing themselves to be directors, and were self-appointed, and in consequence of this all business transacted by them on behalf of the society since and including the first Monday in August is wholly and entirely contrary to rules and regulations and law. The publication states in effect that the self-appointed directors had been and

were transacting business of the society, and it nowhere says that there were any directors that were not of this class or kind. It seems to me to be quite capable of being read as a notification to the public, or to all whom it might concern, that all business that had been from the date mentioned, and was then being transacted on behalf of the society, was illegally transacted.

Even if the publication had said or indicated that only some of the persons acting as directors had been and were self-appointed, stating the *consequence* as it did, I do not perceive that this would make a difference. It would, I think, yet be quite capable of being read as I have said.

Then assume that the publication is capable of being so read, and so read it, is it not defamatory of the society being a society organized for the purposes of and carrying on the business this society was doing? I can only say that I think it is.

At all events, the publication being capable of being read as meaning what I have said, it was, as, I think, properly left to the jury to say and find whether or not it was defamatory of the plaintiffs, and they decided that it was.

I agree in the view that the justification permitted to be set up was not proved, and the motion should, I think, be refused with costs.

I may add that the damages being so small as \$5.00, the defendant should, I think, be content.

A. H. F. L.

Judgment.
Ferguson, J.

[CHANCERY DIVISION.]

JOHNSTON V. EWART.

Defamation—Slander—Words of Abuse Imputing Crime—Understanding of Bystanders—Undisclosed Intention.

In an action of slander for saying of the plaintiff on a public street in the presence of a number of people "you are a perjured villain and I can put you behind the bars, you are a forger and I can prove it," the trial Judge left it to the jury to say whether in their opinion the defendant was really charging the plaintiff with having committed the crimes mentioned :—

Held, misdirection, and a new trial was ordered.

What should have been left to the jury was whether or not the circumstances were such, that all the by-standers would understand that the defendant did not mean to charge the plaintiff with the commission of the crime according to what he actually said, the undisclosed intention of the defendant in this respect having nothing to do with the question and being wholly immaterial.

Statement.

THIS was a motion by the plaintiff to set aside the verdict of the jury in an action of slander, and to enter judgment in favour of the plaintiff or for a new trial upon the ground of misdirection.

The action was tried in Toronto upon March 13th, 1893, before ARMOUR, C. J. and a jury.

The slander complained of, and the portions of the learned Chief Justice's charge objected to, are sufficiently stated in the judgment of FERGUSON, J.

The following grounds were set out in the notice of the present motion :—

1. That the learned Chief Justice should have directed the jury in his charge to them, that the defamatory words spoken and published by the defendant imputed that the plaintiff had been guilty of crimes punishable with imprisonment, and therefore actionable, and that the law presumed that the plaintiff had suffered damages without any proof that the plaintiff's reputation had been thereby injured.

2. That the spoken defamatory words alleged are obviously defamatory, and are not capable of bearing an innocent construction, and that there were no circumstances

brought out in the evidence at the trial of this action that were known to the bystanders at the time, that could qualify the defamatory words, and the learned Chief Justice should have so directed the jury. Statement.

The present motion was argued on June 20th, 1893, before FERGUSON and MEREDITH, JJ.

L. F. Heyd, for the plaintiff. We say the Judge should have told the jury the words were to be interpreted in their ordinary sense, and it was not for the jury to say whether the defendant did or did not intend them in the ordinary sense: *Odger's Law of Libel and Slander*, 2nd ed., p. 80, *seq.*; *Hankinson v. Bilby*, 2 C. & K. 440, 16 M. & W. 442, referred to in *Flood on Libel and Slander*, at p. 89. *Folkard's Law of Slander*, 5th ed., p. 96, *seq.*, shews that a man is liable even if the words be spoken in jest. If the language only has one meaning, and that one which accuses of an indictable offence, it is not for a jury to say whether the man meant the words in that sense or not.

T. E. Williams, on the same side, cites *Webb v. Beavan*, 11 Q. B. D. 609; *Folkard's Law of Slander and Libel*, 5th ed., pp. 86-89. The words used are incapable of bearing an innocent construction, and the Judge, therefore, should have charged the jury to find for the plaintiff; *Odger on Law of Libel and Slander*, 2nd ed., pp. 54-83; *Huber v. Crookall*, 10 O. R. 475; *Harris on Criminal Law*, 4th ed., pp. 1-4.

Fullerton and Segsworth, for the defendant. *Odger's Law of Libel and Slander*, 2nd ed., p. 108, gives the law governing this case.

[MEREDITH, J.—But here, in presence of a number of strangers, the defendant accused the plaintiff of being a perjurer, forger, and thief. How could they know he did not mean it?]

The evidence shews the man's reputation was not injured. The question is, what was the result on the bystanders' minds: *Penfold v. Westcote*, 2 B. & P. N. R. 335. In the one case here, only one man was present.

Argument. In the other case, there was the defendant's partner, and the furthest the evidence goes is, that there were persons passing. The case was one of mere angry abuse. A new trial should not be granted in such a case as this: *Wells v. Lindop*, 15 A. R. 695. The question was one for the jury and was left to them on a very fair and proper charge: *Webster v. Friedeberg*, 17 Q. B. D. 736. The whole ground on which slander is based, is the injury to a man's reputation, and the action is brought to rectify it. But if the words are used in such circumstances as to amount to mere abuse, the verdict should be for the defendant.

Heyd, in reply.

September 16th, 1893. FERGUSON, J. :—

An action for slander tried at the Assizes in Toronto, March 13th, 1893.

The verdict is for the defendant. The plaintiff now moves for a new trial on the ground that the charge of the learned Chief Justice was erroneous, and that the verdict is contrary to law and the evidence.

After some misgivings on the subject, I incline to think that the objection urged as to the charge was sufficiently taken at the trial.

The plaintiff by his pleading says, that on or about the 21st day of September, 1892, the defendant did falsely and maliciously * * speak and publish the following, among other defamatory words, against the character and reputation of the plaintiff: "You are a perjured villain, and I can put you behind the bars; you are a forger and I can prove it." The plaintiff alleges that these statements were made by the defendant on a public street, namely, Spruce street, in the city of Toronto, and in the hearing of several persons.

The plaintiff says that the defendant also on other occasions said that he, the plaintiff, was a thief and a robber, or words to that effect, and that this was said to one

James Ewart, on Queen street east in Toronto, on or about the 15th day of October, 1892. Judgment.
Ferguson, J.

The pleading of the defendant is simply a denial that he spoke and published the words alleged, and as to the claim for special damages, which last seems not to be material.

The speaking and publishing of the words alleged, seems to have been proved at the trial. The defendant gave no evidence.

In his charge the learned Chief Justice said: "The words shewn to have been used, are that he was a perjurer; that he was a forger and he could prove it. I think these are the words upon one occasion. Upon the other occasion he said he was a thief and a robber. These are the words that were used by the defendant. If you are satisfied with the evidence these are the words used by the defendant in regard to the plaintiff."

Afterwards in his charge the learned Chief Justice said: "The question is, whether in point of fact the defendant did really charge the plaintiff with these crimes that he is alleged to have charged, or was it a mere matter of vulgar abuse under the circumstances, he having no intention of charging these offences, and the surrounding circumstances shewing he was not charging these offences. If he was charging the offences he is liable. If the words were only used in respect to a matter which would not be the subject of an indictment—an indictable offence—he would not be liable."

And still later: "If you think, having regard to all the circumstances, that the defendant was really charging the plaintiff with having committed the crime of perjury or forgery, or with stealing, if you think he was really charging him with these offences, then the defendant would be answerable, and it would be for you to say what amount of damages he should pay."

Counsel for the defendant on the argument before us, conceded, and I think properly, that the words were actionable *per se*, but contended that the circumstances were such that what was said was mere abuse.

Judgment.
Ferguson, J. Where words are used that clearly import a criminal charge (as "you thief" or "you traitor"), it is still open to the defendant to shew if he can that he used them merely as vague terms of general abuse, and that the bystanders must have understood them as meaning nothing more than "you rascal," or "you scoundrel." When such words occur in a string of non-actionable epithets, or in a torrent of general vulgar abuse, the jury may reasonably infer that no felony was imputed. See Odger's Law of Libel and Slander, 2nd ed., p. 108, and the cases *Minors v. Leeford*, Cro. Jac. 114, and *Penfold v. Westcote*, 2 B. & P. N. R. 335, there referred to.

In *Penfold v. Westcote*, Sir James Mansfield said: "The jury ought not to have found a verdict for the plaintiff unless they understood the defendant to impute theft to the plaintiff. The manner in which the words were pronounced, and various other circumstances, might explain the meaning of the word; and if the jury had thought that the word was only used by the defendant as a word of general abuse, they might have found a verdict for the defendant." He says: "Supposing the general words which accompany the word 'thief,' might have warranted the jury in finding for the defendant, yet as they have not done so, we cannot say that the word did not impute theft to the plaintiff."

The other Judges were of the same opinion. Chambre, J., remarked that as nothing was given in evidence to explain the word "thief," it could scarcely be considered as imputing anything but theft.

Where the defendant stated publicly that the plaintiff had been detected taking dead bodies from a churchyard and fined, he meant it as a joke, but there was no evidence that the bystanders so understood it, and a verdict for the defendant was set aside. The Chief Justice remarked: "The principle is clear, that a person shall not be allowed to murder another's reputation in jest. But if the words be so spoken that it is obvious to *every bystander* that only a jest is meant, no injury is done, and consequently no

action would lie :” *Donoghue v. Hayes*, *Hayes Irish Ex. Judgment*.
265, referred to in *Odger, ib.*, at p. 108.

Ferguson, J.

In the case *Hankinson v. Bilby*, 16 M. & W. 442, which I find referred to in many or nearly all the text books on the subject, the words were, “ You are a thief, and a bloody thief ;” “ You robbed Mr. L. of thirty pounds, and would have robbed him of more only you were afraid.” The principal witness said that *he* perfectly well knew what these words referred to, namely, the fact of an irregular distress having been made on the goods of the plaintiff by one L., and the plaintiff having brought an action against him, which was compromised for £30, but the witness also stated that other persons, strangers to the circumstances, must also have heard these words, they having been uttered on a public and frequented thoroughfare. On this, Baron Rolfe, in ruling, said that the question was not what the defendant had in the recesses of his mind when he uttered the words, but what any reasonable man hearing them, would have understood by them. The ruling was upheld.

Pollock, C. B., says: “ Words uttered must be understood in the sense which hearers of common and reasonable understanding would ascribe to them ; even though particular individuals better informed on the matter alluded to might form a different judgment on the subject.”

Parke, B., said : “ The witness appears to have been well acquainted with the affair to which the words related. If the bystanders were equally cognizant of it, the defendant would have been entitled to a verdict.” “ First, ascertain the meaning of the words themselves and then give them the effect any reasonable bystander would affix to them.” And, as I understand Alderson, B., he said, if there are no bystanders who could understand the words as imputing a felony by reason of their knowing all about the affair respecting which the words were uttered, the plaintiff should not succeed.

As nearly as I can understand the authorities, so far as they bear upon the question here, unless the words are

Judgment.
Ferguson, J. uttered in a string of non-actionable epithets, or in a torrent of general vulgar abuse, so that for this reason the ordinary bystander would not understand the speaker as meaning what he said, but would understand that he did not mean it, if the speaker use the actionable words, he must be taken to have used them according to their signification as ordinarily understood, unless all the bystanders were aware of and knew all about the matters to which the words related, so that for this reason they would not understand that a charge was being made of an indictable offence, but would understand that such charge was not being made, that is, attributing to each and every bystander the faculties of an ordinary person, at least. There are, of course, the cases where other words are spoken at the same time which explain the words complained of cases where the offence imputed is impossible, etc., but these have no relation to the question in hand.

The defendant cannot give in evidence any facts that were not known to the bystanders at the time the words were uttered; but he is allowed to give evidence of all the surrounding circumstances in order to place the jury as far as possible in the position of bystanders. The defendant's secret intent in uttering the words, is wholly immaterial.

In the present case, the matters out of which the uttering of the words by the defendant arose, was a refusal to renew a certain promissory note for \$200, and some dissatisfaction as to the application of the sum of \$55 that had been paid upon another promissory note. These matters, as I understand the evidence, were not known to all the bystanders, even if they would, if known, be sufficient to cause them to understand that the imputation expressed was not really meant by the defendant. The evidence does not shew, as I think, that the words complained of were uttered in a string of non-actionable epithets, or in a torrent of general vulgar abuse, such as I have referred to.

The charge of the learned Chief Justice seems to me

to have left it to the jury to say whether in their opinion the defendant was really charging the plaintiff with having committed the crimes mentioned, instead of whether or not the circumstances were such that all the bystanders would understand that the defendant did not mean to charge the plaintiff with the commission of crime according to what he, the defendant, actually said, the undisclosed intention of the defendant in this respect having nothing to do with the question and being wholly immaterial. The defendant might not have been really charging the plaintiff (as mentioned by the Chief Justice in his charge to the jury), and yet the bystanders might well imbibe and go away with the conviction that the defendant was so charging the plaintiff, who would in such case be a grievously slandered and defamed person.

I am, for the reasons I have endeavoured to give, of the opinion that the charge was erroneous, and that in consequence of this, the wrong question was, so far as can be seen, tried by the jury in disposing of the case.

I think there should be a new trial, and that all costs hitherto should abide the event.

MEREDITH, J. :—

The words used were obviously defamatory, imputing crimes punishable with imprisonment; there was nothing said in connection with them to break their force, or deprive them of their ordinary signification; they were used on both occasions in the presence of bystanders unacquainted with the circumstances, or provocation, under which they were uttered.

It is said in *Hankinson v. Bilby*, 16 M. & W. 442, that the words uttered must be construed in the sense which hearers of common and reasonable understanding would ascribe to them, even though particular individuals, better informed on the matter alluded to, might form a different judgment on the subject.

Judgment.

Ferguson, J.

Judgment. A defence to the action cannot be constructed upon Meredith, J. facts not known to the bystanders at the time the words were uttered; if, as a matter of fact, it could be said that the defendant did not intend to accuse the plaintiff, and convey the meaning that he had been guilty, of the crimes expressed.

It, therefore, seems to me that there was misdirection in that part of the trial Judge's charge to which objection was taken, and that there must be a new trial.

A. H. F. L.

[CHANCERY DIVISION.]

ALDRICH V. ALDRICH.

Division Court—Jurisdiction—Action on Judgment of High Court—Final Judgment—Abandoning Excess—R. S. O. ch. 51, sec. 70 (b).

In an action for alimony the plaintiff recovered judgment against the defendant for \$211.39, taxed costs, and for alimony at the rate of \$226 per year, payable quarterly. After two instalments of alimony had fallen due and were unpaid, she entered suit for \$100 in the Division Court in respect to the costs, which were also unpaid, abandoning the balance of the costs and the overdue alimony:—

Held, affirming the decision of FERGUSON, J., 23 O. R. 374, that the Division Court had jurisdiction under R. S. O. ch. 51, sec. 70 (b).

Statement. THIS was a motion by the defendant in the original action by way of appeal to the Divisional Court from the judgment of FERGUSON, J., reported 23 O. R. at p. 374.

The motion was argued upon June 23rd, 1893, before BOYD, C., and MEREDITH, J.

H. T. Beck, for the motion. The question is, was there jurisdiction to sue on such a judgment as that sued on here? The plaintiff abandons all alimony already due. The question of the general right to sue on a judgment of

the Superior Court in a Division Court, came up in *Re Eberts v. Brooke*, 10 P. R. 257, 11 P. R. 296. It may be there was jurisdiction there, and yet not here : *Berkeley v. Elderkin*, 1 E. & B. 805. Argument.

[BOYD, C.—You can have an action on a judgment, that is about to run out ; it is just like an action on a contract.]

But this decree for alimony is not an absolute judgment.

[BOYD, C.—But the judgment for costs is.]

But the Division Court Act, R. S. O. ch. 51, sec. 77, forbids the splitting of causes of action. It is this on which I rely. *Berkeley v. Elderkin*, is a strong case against the right to sue here, when the judgment is not an absolute one. In England it has been held that even the overdue payments of alimony may be varied on the ground of conduct of the parties. *Berkeley v. Elderkin*, was referred to in the subsequent cases of *In re Henderson*, 35 Ch. D. at pp. 718 and 719 ; *The Queen v. County Court Judge of Essex*, 18 Q. B. D. 704. See also *Bailey v. Bailey*, 13 Q. B. D. 855. No promise to obey a decree of a Court of Chancery could be implied in a Court of Common Law, and I contend you must treat the judgment for alimony and costs as one judgment. Rule 934 does not make what used to be a decree equivalent to a judgment, except for the purpose of the attaching proceedings referred to, nor is there any legislation which does. The judgment for alimony was not a final judgment in every sense, being open to modification on application : *In re Riddell*, 20 Q. B. D. 512, and the cases there collected ; *In re Binstead*, [1893] 1 Q. B. 199.

W. R. Riddell, for the plaintiff. It appears from *Winger v. Sibbald*, 2 A. R. 610, that by suing in the Division Court as we did, we absolutely abandoned all right to the excess of our claim. See also, *Public School Trustees of Nottawasaga v. Township of Nottawasaga*, 15 A. R. 310. An action can be brought on a judgment for costs : *Marbella Iron Ore Co. v. Allen*, 47 L. J. C. P. 601. So, too, where the order for costs is in the Chancery Division : *Hew-*

Argument. *itson v. Sherwin*, L. R. 10 Eq. 53. Even a decree for alimony made the defendant a judgment debtor: *Oliver v. Lowther*, 28 W. R. 381. The reason why a judgment of the Division Court here, or a County Court in England, is not suable on in a Superior Court, is because such judgments are not final, inasmuch as the Judge can vary them by making them payable in instalments. This is the case of *Berkeley v. Elderkin*. So far as the costs are concerned, the judgment on which we are suing, is a final judgment. *Linton v. Linton*, 15 Q. B. D. 239, shews the distinction between arrears of alimony, and alimony which has not come due. The former constitute a debt within the meaning of the Bankruptcy Act. On this point I also cite *Nunn v. Nunn*, 8 L. R. Ir. 298, 303. The effect of the judgment was to make a promise on the part of the defendant to pay the costs, and so it would for the alimony so far as it had become due.

Beck, in reply. *Linton v. Linton*, has no application. Under the combined effect of sub-sec. 6 of sec. 70 of the Division Court Act, R. S. O. ch. 51, and section 77, there was no jurisdiction. *Bailey v. Bailey*, shews clearly that the past due payments of alimony might be varied.

[BOYD, C.—That certainly was never the practice here.]

The name decree has been changed to that of "judgment," but the nature of the old decree has not been changed.

September 16th, 1893. BOYD, C. :—

The Division Court Act, R. S. O. ch. 51, sec. 70, clause (b), gives jurisdiction to these inferior Courts upon all claims of debt when the claim does not exceed \$100. "Debt," thus generally used, is sufficient to mean "judgment debt," which is the highest of all debts: *Hodsoll v. Baxter*, E. B. & E. 882, followed with approval in *Grant v. Easton*, 13 Q. B. D. 302. The like language used in the English County Court Act, 9-10 Vict. ch. 95, sec. 58, giving jurisdiction in all pleas of personal actions where the

debt or damage claimed is not more than £20, was held sufficient to enable that lower Court to try an action of debt on a judgment recovered in the Queen's Bench: *In re Winsor v. Dunford*, 12 Q. B. 603. In consequence of which, I suppose, in the later Act as to County Courts, 19-20 Vict. ch. 108, sec. 27, it was enacted that "no action shall be brought in a County Court on any judgment of a Superior Court." The like legislation may be had in this Province, but till then, I am led to conclude that jurisdiction exists in our Division Courts to sue upon final judgments of the Superior Courts, however wide-sweeping the consequences may be.

Judgment.

Boyd, C.

Upon other points I agree in the judgment of my brother Ferguson wherein these are fully discussed. There is no splitting of demands in the present claim within the mischief of section 77 of the Division Court Act. The claim for taxed costs is different and severable from the accruing claims for the gales or instalments of alimony, and forms of itself an entire and distinct claim of debt or in the nature of debt.

A clear statement as to the principle regulating jurisdiction is found in the judgments of Pollock, C. B., and Alderson, B., in *Williams v. Jones*, 13 M. & W. at p. 633, 634, and may be thus expressed: When a Court of competent jurisdiction adjudges a sum of money to be paid, an obligation to pay is thereby created, and an action of debt may be brought on such judgment. This principle, says Alderson, B., is not affected or limited by the consideration that a more extensive remedy may be obtained against the defendant, [than could be obtained, that is, by the original judgment]. See also *Hutchinson v. Gillespie*, 11 Exch. 797, 810; *Russell v. Smyth*, 9 M. & W. 810, 814, and *Henderson v. Henderson*, 6 Q. B. 288.

The appeal is dismissed with costs.

MEREDITH, J.:—

The jurisdiction conferred upon Division Courts by section 70 of "The Division Courts Act," R. S. O. 51, is

Judgment.
Meredith, J.

plainly quite wide enough to include an action or claim upon a judgment of a Superior Court. The first question for consideration is, therefore, whether there is anything, having regard to the general scope of the Act, or in any of its particular provisions, excluding such an action or claim; and, if not, lastly, whether the judgment in question is one of such a character that an action would not lie in any Court upon it.

Now, though it is said that an action on a judgment of a Superior Court is not to be favoured, as there is another remedy for enforcing it: *Biddleson v. Whitel*, 1 W. Bl. 507; the right of action upon such a judgment has always been unquestionable. The question being rather whether the plaintiff should have the costs of it: see C. L. P. Act, R. S. O., 1877, ch. 50, sec. 344.

Then why should not a Division Court have jurisdiction in an action of debt upon a judgment of the High Court, if it be in other respects within its jurisdiction? It is true, that it is well settled law that an action will not, in England, lie in the High Court upon a judgment of the County Court: *Berkeley v. Elderkin*, 1 E. & B. 805, and *Regina v. The County Court Judge of Essex & Clarke*, 18 Q. B. D. 704: nor, in this Province, in the High Court upon a judgment of the Division Court: *McPherson v. Forrester*, 11 U. C. R. 362, and *Donnelly v. Stewart*, 25 U. C. R. 398: the Courts having reached the conclusion that the legislature intended that the remedies provided for enforcing judgments in those Courts should be alone resorted to, and that a judgment of those inferior Courts is different from an ordinary judgment.

But I am not aware of any case in which it has been held that an action will not lie in an inferior Court upon an ordinary judgment of a Superior Court, except *Re Eberts v. Brooke*, 10 P. R. 257, which, however, was reversed in the Divisional Court: see 11 P. R. 296. In that case the learned Judge in Chambers said that he had seen no case in which such an action had been brought; and that there was a fatal objection to it, in this, that the

judgment of the Superior Court could not be interfered with by the judgment of the inferior Court, and that there remained two judgments for the same obligation. There was, however, express authority for such an action: see *In re Winsor v. Dunford*, 12 Q. B. 603. Some eight years after that case was decided, the Imperial Parliament expressly provided that no action should be brought in the County Court upon a Superior Court judgment: see 19-20 Vict. ch. 108, sec. 27, and the County Courts Act, 1888, 51-52 Vict. ch. 43, sec. 63. That legislation does not seem to have been followed in this Province. And that which he considered a fatal objection, loses its force in view of the case of *Jones v. Jenner*, 25 L. J. Ex. 319; 2 Jur. N. S. 574, in which it was held that where a plaintiff sued in a County Court on a judgment of a Superior Court, and obtained an order for payment by instalments, some of which had been paid, he could not resort to the process of the Superior Court to enforce the judgment: but in any case the Courts have such inherent power over their own process, that there would be no danger of any real oppression. And in this particular case, there is also an abandonment of the excess in amount over the inferior Court's limit, in accordance with the practice of the Court: see *Winger v. Sibbald*, 2 A. R. 610.

So there seems to me to be nothing in principle against an action in the Division Court upon a judgment of the High Court; and there is the direct authority in England and here, before referred to, in favour of it. In *Re Eberts v. Brooke*, the action in the Division Court was upon a County Court judgment, but that cannot make any difference; judgments in the High Court and County Courts here, are alike in their nature and effect, and recovered and enforceable in like manner.

Nor can I perceive how the claim as made in this action in the Division Court can be considered a violation of the provisions of section 77 of the Act, R. S. O. ch. 51. The claim was made upon the whole sum payable for alimony, as well as costs, when the action was brought, the excess

Judgment.

Meredith, J.

Judgment. being abandoned. Having regard to the principles upon which the action on a judgment rests, an implied promise, or statute imposed obligation, to pay, it is hard to understand how, where the action is brought for all that is payable, it can be said there is any dividing of a cause of action into two or more parts for the purpose of bringing the same within the jurisdiction of a Division Court, within the meaning of the section, because that which was not then, and might never become, payable, was not added: see *Public School Trustees of Nottawasaga v. The Township of Nottawasaga*, 15 A. R. 310.

Meredith, J. This brings me to the last question, whether the judgment is of such a special character that an action would not lie upon it in any Court; a question of some difficulty and the only one that has caused me any doubt. Though recovered in an action in and by the ordinary process of the High Court, it is certainly exceptional in several respects. Under section 29 of the Judicature Act, R. S. O. ch. 44, alimony when granted, is to continue until the further order of the Court; and it has even been said that the Court has power to interfere and vary an order in respect of past due payments of interim alimony: see *Bailey v. Bailey*, 13 Q. B. D. 855, at p. 857-8: [but here there is in respect of the costs of the action alone more than the amount claimed in the Division Court absolutely and unalterably due, and the rest is abandoned]: and under section 30 of the same Act, provision is made for the registration of an order or judgment for alimony, so as to bind the defendant's lands "and operate thereon in the same manner and with the same effect as the registration of a charge by the defendant [of a life annuity on his lands:]" see *Abraham v. Abraham*, 19 O. R. 256, and 18 A. R. 436.

But, in this Province, it is a judgment recovered and generally enforceable upon and by the same proceedings and process as any other judgment of the Court, and generally the distinctions between legal and equitable claims and the manner of prosecuting and enforcing them, have been so

much removed, that the adjudications—somewhat difficult Judgment.
now to fully appreciate—that although a promise to pay a Meredith, J.
common law judgment debt would be implied, no such
promise in respect of any sums payable under a decree in
equity would be, may have lost their force.

But the claim in question cannot be said to be merely an equitable one. The plaintiff's action for alimony was based on the statute before referred to, and, here, the ordinary proceedings and process for enforcing the claim and judgment, are the same as for enforcing legal claims and judgments thereupon, and this judgment is, therefore, different from a decree for alimony of the Divorce Court in England, which under 20 & 21 Vict. ch. 85, sec. 52, was made enforceable, "as the judgments, orders and decrees of the High Court of Chancery, may be now enforced and put in execution." And so the case of *Bailey v. Bailey*, 13 Q. B. D. 855, is distinguishable from this case; and this judgment seems to me to stand upon the like footing, in this respect, as common law judgments.

I am accordingly of opinion that the judgment in question has not been successfully attacked, and concur in dismissing the motion with costs.

A. H. F. L.

[CHANCERY DIVISION.]

McKINNON v. LUNDY.

Will—Construction—Condition Precedent—Condition Subsequent—Death of Testatrix Feloniously caused by Devisee—Lapse.

A testatrix devised part of a lot to her husband, adding : “ He to pay off the mortgage to * . Should he not pay the said mortgage off at maturity, the same land to become the property of my children and sold with the remaining portion of said lot.” The land thus devised had been previously conveyed to her by her husband, and subsequently, the latter for valuable consideration, again conveyed the land to her, subject to the mortgage which she covenanted to pay off and did pay off some days before it actually matured. Afterwards, the husband killed the testatrix and was convicted of the crime of manslaughter. Between her death and his conviction, and notwithstanding the above conveyances, he purported to convey the land to his brother in trust to sell, and out of the proceeds to pay for his defence at his trial for murder and to hold the balance in trust for him the grantor, and the brother now claimed the land as against the representatives of the testatrix :—*Held*, (1) That the condition in the above devise as to paying off the mortgage was a condition subsequent, and its performance having become impossible by the prior payment of the mortgage, became void.

(2) That the gift in favour of the children was in the nature of an executory devise which could only take effect on the happening of the event referred to, namely the default of the husband in not paying the mortgage, but as there was no such default, the children took nothing by the devise.

But (3) That by his felonious act in killing his wife, the husband had absolutely precluded and debarred himself from obtaining any benefit under her will or out of her estate, and his grantee, his brother, could stand in no better position than himself, and, therefore, there was an intestacy as to these lands.

Statement.

THIS was an action for a declaration that the plaintiffs, other than the plaintiff McKinnon, were the owners of certain lands.

The action was tried on September 11th, 1893, before FERGUSON, J., at the sittings at Guelph.

The facts are fully stated in the judgment.

S. H. Blake, Q.C., and D. Guthrie, Q.C., for the plaintiffs. The conveyance to the wife was for the purpose of mortgaging for \$500, and upon the husband paying the money, she was to re-convey to him. The will adopts the agreement and directs it to be carried out. Then the

husband absolves the wife from the agreement, and the conveyance of April 6th, 1892, did away with it. The husband takes nothing by the will by reason of the transaction of 1892: *Vansickle v. Vansickle*, 9 A. R. 352; *Archer v. Severn*, 8 A. R. 725; S. C. Dig. 875. Under no circumstances was he to have the property unless he paid the mortgage. The transaction of 1892 put it out of his power to pay the mortgage: Jarman on Wills, 6th Am. ed. vol. 2, marg. pp. 842n. 843, 849, 852-3; *Large v. Cheshire*, 1 Vent. 147. The paying off the \$500 mortgage was a condition precedent. The fulfilment of this condition being impossible, the gift ceases. Moreover, the husband could have made no claim till the decease of his wife and having killed her he cannot claim any advantage by reason of his own wrong: *Cleaver v. Mutual Reserve Fund Life Association*, [1892] 1 Q. B. 147, the case which arose out of the murder of Mr. Maybrick.

Aylesworth, Q.C., and *Morphy*, for the defendants. In the Maybrick case there was murder. Here there is only manslaughter, there was no malice aforethought. In the Maybrick case the money was the price of the life taken, but that is not so here. Manslaughter may be by neglect only, and no one would say that such a case would prevent one from taking. The payment off of the mortgage was a condition subsequent, and on the performance of the condition becoming impossible or unnecessary, the devise became absolute: Theobald on Wills, 3rd ed., p. 375; Jarman on Wills, 6th Am. ed., vol. 2, p. 12; *Gath v. Barton*, 1 Bea. 478; *Darley v. Langworthy*, 3 Bro. P. C. 359; Wills Act, R. S. O. c. 109, secs. 21, 25, 26, 30. There was ample time to alter the will if it had been desired. Besides the devisee did perform the condition by conveying to his wife and so procuring her to pay off the mortgage.

October 14th, 1893. FERGUSON, J.:—

The action is for, amongst other things, a declaration that the plaintiffs, other than the plaintiff McKinnon, are the owners of the land in question.

Judgment. The plaintiff McKinnon is the administrator, with the
Ferguson, J. will annexed of the estate of the late Clementina Lundy, who
was the wife of James B. Lundy. The other plaintiffs are
the children of James B. Lundy and Clementina Lundy,
deceased.

The defendant (Joseph Lundy) is a brother of James B. Lundy, and claims to be entitled to the land by virtue of a conveyance thereof to him from the said James B. Lundy on the 25th day of August, 1892, under or subject to the trusts in the conveyance set forth.

It was admitted that on and prior to the 25th day of April, 1887, James B. Lundy was the owner of, and had a good title to these lands. The title claimed by the plaintiffs, as well as that claimed by the defendant, seems to be derived from that title of James B. Lundy. The lands are a part of lot number nine, in the third concession of the township of Chinguacousy, in the county of Peel, containing, as is said, twenty acres.

On the 25th day of April, 1887, James B. Lundy made a conveyance in fee of these lands for the expressed consideration of five hundred dollars to his then wife, the said Clementina Lundy, and on the same day Clementina Lundy executed a mortgage upon the lands in favour of one John McCulla, to secure the sum of \$500 and interest, the principal money to become due and payable in five years from the date of the mortgage, the interest being made payable annually.

On the same day, the 25th day of April, 1887, an agreement was made between Clementina Lundy and her husband James B. Lundy, whereby after reciting in part the aforesaid conveyance to her, the mortgage to McCulla, and, that it was agreed and understood that the husband James B. Lundy should pay the principal and interest secured by the mortgage, she, Clementina Lundy, consented and agreed in consideration of the premises and of one dollar, to transfer and reconvey to her husband James B. Lundy, all the right, title and interest that she had acquired under the conveyance of the land from him

“upon payment” by him of the principal and interest accruing due upon the mortgage. Judgment.
Ferguson, J.

It is alleged in the pleading, was conceded at the bar, and appears in the evidence, that Clementina Lundy was at the time the owner of separate estate, and no question was raised as to the operation of any of these instruments. They were assumed to have full operation according to their respective tenors.

On the 5th day of September, 1888, Clementina Lundy made and published her last will and testament, whereby she devised these lands to her husband James B. Lundy, the clause containing the devise being as follows :

“That part of lot number nine in the third concession, west of Hurontario street, in the township of Chinguacousy, conveyed by my husband James B. Lundy to me by deed dated the 25th day of April, 1887, I give, devise and bequeath to the said James B. Lundy, he to pay off the mortgage to McCulla. Should he not pay the said mortgage off at maturity, the said land to become the property of my children, and sold with the remaining portion of said lot.”

Clementina Lundy was the owner of an adjoining fifty acres of the same lot of land, and her will contained, amongst many other things, certain directions for the sale of her lands, as to which, I think, no further reference need be made here.

On the 6th day of April, 1892, James B. Lundy, for the consideration of \$265, granted, released and quitted claim to the lands in question to and in favour of Clementina Lundy. This conveyance recites in part the conveyance of the 25th of April, 1887, the mortgage to McCulla, and that it was executed at the request of James B. Lundy, the agreement of the same date, April, 25th 1887, and the fact that a sale of the land had been agreed upon (from him to her). This conveyance is expressly subject to the mortgage to McCulla, and contains a covenant on the part of Clementina Lundy to pay off and discharge this mortgage, and in respect of the same to save harmless James B. Lundy.

Judgment.
Ferguson, J. A few days after this last-mentioned conveyance, and on the 13th day of April, 1892, Clementina Lundy paid off the mortgage to McCulla out of her own money, the mortgage not, however, falling due till the 25th of April, 1892, and she paid also out of her own moneys the \$265, thus paying for the land a consideration of \$765, to which may be added whatever interest she paid upon the mortgage.

On the 22nd of April, 1892, James B. Lundy killed his wife, Clementina Lundy, and on the 22nd of September, 1892, he was for this convicted of the crime of manslaughter and sentenced to a punishment of twenty years in the Provincial Penitentiary, where he now is undergoing the sentence.

Two mortgages affecting the land made by James B. Lundy, one in favour of Ferris, dated the 1st of June, 1874, and the other in favour of McClure, dated the 1st of June, 1877, securing respectively \$150 and \$200, were put in while the evidence respecting the payment of the McCulla mortgage was being given. I do not now perceive what bearing these have upon the matters that I have to determine.

On the 25th of August, 1892, James B. Lundy made a conveyance of the land in question to his brother, the defendant Joseph S. Lundy, for the expressed consideration of \$1, but in trust to sell the same and out of the proceeds to pay a liberal sum for the defence of him, James B. Lundy, in respect of the crime for which he was then committed for trial, namely, the killing of his wife, Clementina Lundy, and after payment of the same and all expenses, to hold the balance in trust for James B. Lundy, his heirs, executors and assigns.

This is the document on which the defendant rests his title, he saying that James B. Lundy had a good title and thus conveyed and transferred it to him.

The plaintiffs say and contend that James B. Lundy had not a title. Thus is involved the construction and meaning of or what effect is to be given, in the compli-

cated circumstances, to the will of Clementina Lundy or ^{Judgment.} this clause of it, and, amongst other things, the capability ^{Ferguson, J.} or not of James B. Lundy to take as devisee under the will, he having, by his criminal act aforesaid, taken the life of the testatrix, and whether or not the defendant, his assignee, stands in regard to title in any better or stronger position than did James B. Lundy.

As will be observed, this devise is a gift of the land to James B. Lundy, "he to pay off the mortgage to McCulla," and upon his failure to pay it off at maturity, then a gift over to and in favour of others.

The arguments upon the subject seemed to me to embrace the whole field of inquiry as to whether this devise really contained or was upon a condition, and, if so, whether such condition was and must be considered to be a condition precedent, or a condition subsequent, or, whether a charge only was created.

To constitute a condition it must be clear that the testatrix intended the gift to take effect or continue only in a certain event, and it has been frequently said that there is no distinction in the way of technical words between conditions precedent and conditions subsequent, that the distinction is matter of construction dependent upon the intention of the testator as manifested by the will. This is stated in many of the books, and must, I think, be received as a general proposition of law.

It is said in Theobald on Wills, 3rd ed., at p. 374, that whether a condition is subsequent or precedent must depend on the language in which it is framed, and very little help can be derived from decided cases on the subject. This statement is to be found in many other books and authorities, and, after some search for a guiding authority in the present case, I am led to realize the truth of it.

I may here say that I am entirely unable to take the view or arrive at the conclusion that the devise in question is a gift of the land subjected merely to a charge upon it for the amount of the mortgage to McCulla. The sense of the language employed in the gift appears to me

Judgment. to be against this view, and I think the gift over incompatible with it.
Ferguson, J.

I am of the opinion that the devise is a conditional one, and the question as to whether the condition is a condition precedent or a condition subsequent arises and seems of great materiality so far as the construction of the devise alone has concern in determining the rights of the parties.

In the contention that the gift was upon a condition precedent reference was made to the agreement of the 25th of April, 1887, about one year and a half before the making of the will, counsel suggesting and contending that in viewing the whole case and all the circumstances, a fair conclusion would be that this devise was made for the purpose and with the intention of "carrying into effect" the provisions and terms of the agreement. That agreement, as before stated, provided for a conveyance by the wife to the husband of the then interest in the land "upon payment" by him of the mortgage to McCulla. These words "upon payment" were relied upon as constituting or shewing a condition precedent in the agreement, and the contention was that the words of the devise should be construed in the same way, the words in the devise "he to pay off the mortgage to McCulla," being capable of receiving this construction. The words "he to pay off the mortgage" might, I think, if looked at alone, be so construed. The authority referred to by counsel, or rather one of the authorities referred to, was the case *Large v. Cheshire*, Vent. 147, a case that I find referred to in *Acherley v. Vernon*, Willes 153, where the Lord Chief Justice, in discussing the effect of the words "upon condition that she release," says they are the same in effect as "she releasing." The expression under discussion in that case was in this way reduced to this: "I give her the annuity, she releasing," and the learned Chief Justice said, at p. 159-60: "This expression has always been holden to make a condition precedent," referring to *Large v. Cheshire*, which was a case of a man agreeing to pay £50 to J. S., *he making him a good estate in the lands.*

So far as the construction and meaning of the expressions themselves have concern, I do not perceive any very material difference between the expressions: He making him a good estate, and, he to make him a good estate, or between she releasing, and, she to release, or between *he paying off the mortgage*, and, *he to pay off the mortgage*. Yet, and notwithstanding the use of the word "always" by Chief Justice Willes as above, it seems clear that in construing such an expression it must be taken and considered in the setting in which it is found. In the case before the Chief Justice the annuity was the consideration for the release, and so in *Large v. Cheshire*, the one thing was the consideration for the other; and it is said in 'Theobald on Wills, 3rd ed., p. 374, and seems to be a general rule, that a condition which involves anything in the nature of a consideration is in general a condition precedent.

Judgment.
Ferguson, J.

It is also said in Theobald, at the same page, that when the condition requires something to be done that requires time, the argument is in favour of construing it as a condition subsequent.

The mortgage to McCulla did not fall due for some three years after the date of the will. "He to pay this off" must be taken to mean he to pay it off at maturity, and in the gift over that follows, this expression is used, and the testatrix might have died at any time after the making of the will during these three years.

As I have already said, one must in endeavouring to ascertain the effect of the words "he to pay off," etc., take them in the connection in which they are in the devise, and in so doing one is bound to read the whole devise including the gift over in favour of the children, and in regard to the effect of this gift over, I do not at present see that I can do better than refer to the cases found in Hawkins on the Construction of Wills, at p. 240 *seq.*, under the case *Edwards v. Hammond*, 1 B. & P. N. R. 324, *n.*

Looking at the whole of this particular devise in the will, and endeavouring to ascertain the sense and meaning of it, and taking into account what I conceive to be the

Judgment. effect, upon construction, of the gift over, I can arrive at
Ferguson, J. no conclusion but the one that the condition is a condition subsequent, and so intended by the testatrix. I cannot see that the existence of the agreement made one and a half years before the date of the will, containing, as it does, the words "upon payment," can or should cause the difference in construction, or have the effect ingeniously contended for. There is no reference by or in either document to the other, and a considerable period intervened between them. I cannot take the view that the purpose of the devise in question was, as contended, to carry out the agreement, and I think the agreement can in the effort to construe the will only be looked at as a circumstance existing at the time the will was made, serving like other existing circumstances to cast light upon the meaning of the testatrix in employing the language she does in her will; and looking at it in this way I do not think it of sufficient force to vary what apart from it I think the proper meaning of the devise in question. I need not, I think, stop here to refer or allude to what changes might have taken place in the mind of the testatrix after the agreement and before the will, etc., etc.

Then, shortly, I think this devise in the will is a gift of the land to James B. Lundy, with a condition subsequent that he should pay off the mortgage to McCulla at maturity, and in default of his so doing, a gift over in favour of the children. The estate, marked out in this devise, to be taken by James B. Lundy was, as I think, an estate known as a conditional limitation, one that would cease upon breach of condition and this without entry by the heir: 4 Kent's Com. on Amer. Law, 12th ed., at p. 126.

In Jarman on Wills, 6 Am. ed., vol. 2, p. 12 (the author referring to Coke Litt. 206 b, and several American cases); it is said to be clear that where a condition precedent annexed to a devise of real estate, or a charge on realty, becomes impossible of performance, and though there be no default or laches on the part of the devisee himself, the devise fails. And, on the other hand, it is clear that if

performance of a condition subsequent be rendered impos- Judgment.
 sible the estate to which it is annexed, whether in land or Ferguson,
 money legacies, by that event becomes absolute. I need
 not, I think, delay by referring to cases on these subjects.
 This general statement seems to me, after having looked
 at several cases, to be the law. So where the condition is
 impossible in its creation, if the condition is precedent, the
 devise being of real estate is itself void; if, however, the
 condition is subsequent, the devise, whether of real or per-
 sonal estate, is absolute : Jarman, *ib.*, at pp. 14 and 15.

From what has been said in respect of the transaction
 between the husband and wife of the 6th of April, 1892,
 and the payment and satisfaction by her thereafter of the
 mortgage to McCulla, it appears, as I think, plainly enough
 that this condition subsequent though perfectly possible of
 performance at the time of the making of the will, became
 impossible of performance before the death of the testa-
 trix; then, whether the will is considered as speaking from
 the time of the death of the testatrix, or from the time of
 its execution, the devise to James B. Lundy is as if no
 condition had been annexed to it; that is to say, whether
 the condition being a condition subsequent is looked upon
 as a condition possible of performance, that became impos-
 sible of performance, or a condition that was in its creation
 impossible of performance, the estate would pass to the
 devisee without the condition. The condition, being a
 condition subsequent, either was or became void, and the
 estate given absolute.

Then in respect of the gift over in favour of the children.
 This seems to me to be in the nature of an executory devise
 which would spring up and take effect of its own inherent
 strength upon the happening of the given event, and the
 question is, did that event happen. The event was the
 default of James B. Lundy in not paying off the mortgage
 to McCulla at maturity. There was not such default by
 him, because the mortgage had been paid off by the testa-
 trix before its maturity, and he could not do, or have done
 the particular act. The gift in favour of the children

Judgment. depended upon the happening of this particular event, Ferguson, J. which was as a condition precedent to the gift over to them taking effect. This particular event did not happen, as I think, nor can it hereafter happen, so that the children, in my opinion, take nothing by this devise.

The result, then, is that according to the construction of the devise in question, James B. Lundy, in the events that have taken place, apart from the event or fact that the death of the testatrix was caused by his crime and the effect of this, would be entitled to the land in question.

I have now to consider the effect, upon the question I have to determine, of the fact that the death of the testatrix was caused by the crime of this devisee, James B. Lundy, her husband, of which he was convicted. It was said at the bar that he was indicted for the murder of the testatrix. This was not contradicted, and I suppose it is, without doubt, a fact, though the indictment was not put in evidence. The conviction, by a certified copy thereof, was in evidence before me, however. This states that James B. Lundy was on the 12th day of September, 1892, convicted: "For that the said James B. Lundy on the 22nd day of April, in the year of our Lord one thousand eight hundred and ninety-two, at the town of Brampton, in the county of Peel, did feloniously kill and slay one Clementina Lundy, upon which conviction judgment passed against the said James B. Lundy, and he was sentenced to twenty years in the Provincial Penitentiary at Kingston for the same." The Clementina Lundy named in the conviction was the testatrix.

The pleadings set up, and so also did counsel at the bar, that by this felonious act James B. Lundy absolutely precluded and debarred himself from obtaining any benefit under the will of the testatrix, or out of her estate. The authority relied on, or chiefly relied on in support of this contention was the case *Cleaver v. Mutual Reserve Fund Life Association*, [1892] 1 Q. B. 147. For the plaintiffs it was contended that that case decided by a Court of

Appeal in England is conclusive on the subject. In that Judgment. case the conviction was for the crime of murder. In the Ferguson, J. present case the conviction is for manslaughter. The form of the conviction I have before referred to. As to the manner in which the crime in the present case was committed there is no evidence except that of a daughter of the testatrix, who said she was in the house when her father shot her mother. It was suggested, and I apprehend rightly, that on the subject of the crime, only the indictment and conviction should be looked at, the conviction, like any other judgment, being, while it stands, evidence of uncontrollable verity.

Counsel for the defendant sought to shew two differences between the case relied on and the present case. One was that in that case the money in question was the price of the life that was taken, it being the money claimed under a policy of insurance on that life, and this difference of fact between that case and the present case does seem to exist, but I fail to comprehend that it is of any controlling materiality.

The other difference contended for was this: In that case there was a conviction for the crime of murder which necessarily involved a finding of the existence of malice aforethought. In the present case the indictment was for murder, but the conviction was for manslaughter only, and there is necessarily involved a finding that there was not malice aforethought. So far as I can perceive, this mode of treating the immediate matter cannot be gainsayed, and it seems that there does exist this difference of fact between that case and the present case.

The decision in that case seems to be clearly expressed in the headnote, which is:

“The executors of a person who has effected an insurance on his life for the benefit of his wife can maintain an action on the policy, notwithstanding the fact that the death of the insured was caused by the felonious act of the wife. The trust created by the policy in favour of the wife under the Married Woman's Property Act, 1882, sec.

Judgment. 11, having become incapable of being performed by reason of her crime, the insurance money forms part of the estate of the insured; and as between his legal representatives and the insurers no question of public policy arises to afford a defence to the action."

Ferguson, J.

It was contended, too, that the question for decision here is not the identical point decided in that case, as the Court there said that as between the parties before them no question of public policy arose, and in one view, this contention seems quite tenable; but this view seems to me to be a narrow view of the decision, for some of the learned Judges based their opinions upon the view of the law, that the trusts in favour of the wife became incapable of being performed by reason of her crime, and in consequence of the rule of public policy. Lopes, L. J., after stating this, said, at p. 161: "The trusts in favour of the wife must then be regarded as struck out, and that being so, a resulting trust in favour of the husband's estate arises." And I take it to be clear, that when a statement of law, or in respect to the law, is plainly the ground or reason upon which the conclusion in the case under discussion is based, such statement cannot be considered as dictum only.

Lord Esher, M. R., in the course of his discussion of certain sections of the Married Woman's Property Act, said, at p. 154: "Applying the rule of public policy to this construction of the section, the wife here has by her crime rendered the trust in her favour incapable of performance. It must, therefore, be treated as if it did not exist." And further on, the same learned Judge said: "Any one claiming through the wife is shut out by the rule of public policy; so that any assignee from her, or other person claiming through her, cannot recover the money."

Fry, L. J., in giving judgment, said, at p. 156: "It appears to me that no system of jurisprudence can with reason include amongst the rights which it enforces, rights directly resulting to the person asserting them from the crime of that person. If no action can arise from fraud, it seems impossible to suppose that it can arise from

felony or misdemeanour." And further on the learned Judgment. Judge said: "This principle of public policy, like all such Ferguson, J. principles, must be applied to all cases to which it can be applied, without reference to the particular character of the rights asserted, or the form of its assertion." This learned Judge also places the right of the plaintiffs to recover on the footing of a resulting trust based upon the proposition that the trust in favour of the wife who had committed the crime was incapable of being performed: see the concluding paragraph of his judgment. In another part he says, at p. 159: "In a word, I think the rule of public policy should be applied so as to exclude from benefit the criminal and all claiming under her, but not so as to exclude alternative or independent rights."

As it appears to me the learned Judges in that case clearly expressed the opinion that the rule referred to applies, and should be applied, in all cases of crime where the criminal claims a benefit directly resulting from his crime, and this opinion seems to have been the basis of their conclusion.

In the present case the crime was a felony, for which the criminal was sentenced to a period of twenty years in the penitentiary, and I do not see that I can by possibility give effect to the ingenious argument founded upon the finding indirectly that there was not malice aforethought.

I do not think it needful to pursue this matter any further. I think I am fully authorized in expressing the opinion that the rule of public policy applies in the present case, and that it must be held that the criminal, James B. Lundy, cannot be permitted to take any benefit under the will of his late wife, Clementina Lundy, whom he killed, and, applying the same rule, that he cannot inherit from her any part of the estate to which at the time of her death she was entitled; and further, that his assignee, the defendant, Joseph Lundy, stands in no better position in this respect than did James B. Lundy, and cannot derive a good title through him to any part of the property that was at the time of her death property of Clementina Lundy.

Judgment.
Ferguson, J.

In these circumstances there is, as I think, in effect an intestacy of Clementina Lundy as to these lands. James B. Lundy cannot take under the will, nor can he inherit. Her children do not take under the devise in their favour, because the condition on which the gift to them was to take effect, was not performed, that is to say, the event on the happening of which their interest was to arise, did not happen, nor can it ever happen.

The lands will therefore go as in cases of intestacy, except that James B. Lundy cannot inherit any interest. Under the provisions of the Act known as the Devolution of Estates Act, the lands will devolve upon the plaintiff McKinnon, I apprehend. This, however, may not be important.

The three plaintiffs, other than McKinnon, are all of the children of Clementina Lundy, and they, I think, inherit from her these lands in equal shares as tenants in common.

1. The plaintiffs are entitled to the declaration they ask, namely, that the plaintiffs, other than the plaintiff McKinnon, are the owners of the lands, subject, however, to claims of creditors, etc., etc., as in the ordinary case of inheritance of lands.

2. The plaintiffs seem to be entitled to the injunction they ask.

3. The plaintiffs are also entitled to have the conveyance from James B. Lundy to Joseph Lundy cancelled and removed from the Registry as being a cloud upon their title.

4. The plaintiffs claim that they should be awarded \$500 damages, but I do not see that on the evidence I am in a position to award any sum as damages.

5. The plaintiffs are, I think, entitled to their costs against the defendant. I do not see that any general rule respecting costs in cases for the construction of wills, administration of estates and the like, should apply here, and the plaintiffs will have their costs as above from the defendant.

[CHANCERY DIVISION.]

GILLARD & Co. v. BOLLERT.

Bills of Sale and Chattel Mortgages—Interpleader—Possession after Default—Seizure by Sheriff—“Actual and Continued Change of Possession”—“Persons who become Creditors”—R. S. O. ch. 125, secs. 1 and 5—55 Vict. ch. 26, secs. 3 and 4.

Where a sheriff seized goods under a writ of execution placed in his hands subsequently to the making of an unregistered chattel mortgage, and subsequently also to the mortgagee having under the power therein in that behalf taken possession of the goods and having sold them to a purchaser who had also gone into possession :—

Held, on interpleader, that the goods were not exigible by the sheriff, as against such purchaser.

“Actual and continued change of possession,” which by 55 Vict. ch. 26, sec. 3 (O.), is to be “open and reasonably sufficient to afford public notice thereof,” has reference only to the “actual and continued change of possession” mentioned in sections 1 and 5 of the Chattel Mortgage Act, R. S. O. ch. 125, and does not refer to possession taken by a mortgagee after default.

The words “persons who become creditors” in 55 Vict. ch. 26, sec. 4, mean persons who become execution creditors as provided for in section 2 of that Act, unless they are simple contract creditors suing on behalf of themselves and other creditors as provided for in section 2.

THIS was an interpleader issue, which was tried on Statement. September 11th, 1893, before FERGUSON, J., at Guelph.

The facts are fully set out in the judgment.

W. F. Walker, Q.C., for the plaintiff.

E. F. B. Johnston, Q.C., and *D. Guthrie*, Q.C., for the defendant.

September 23rd, 1893. FERGUSON, J.:—

This is an interpleader issue tried before me at Guelph.

The plaintiffs in the issue are execution creditors of one Eckenswiler, a merchant, carrying, or who carried on his business at Clifford, in the county of Wellington.

The writ of execution was received by the sheriff at 6.45 p.m. on the 31st day of July, 1893; and the evidence of the sheriff, which is not in any way doubted or contradicted, is that he made a seizure of Eckenswiler's goods—the stock in the store—on the 1st day of August, 1893.

Judgment.
Ferguson, J. Eckenswiler was indebted to Messrs. McMaster & Co. in a large sum, about \$1,600, and they retained or employed Mr. Cutton to "look after" their claim. On the 26th day of June, 1893, Cutton went to Clifford, saw Eckenswiler, presented a statement to him which shewed \$900 over due and \$700 to fall due, and asked him for money. Eckenswiler had no money, but he gave a chattel mortgage upon the goods to secure \$1,622.98. Of this sum (and interest) \$909.98 was made payable on demand, \$300 on the 15th day of July, 1893, \$206 on the 15th day of August, 1893, and \$207 on the 15th day of September, 1893. The mortgage contained the usual clause as to the mortgagees having the right and power to take possession and sell by public auction or private sale upon default being made by the mortgagor, and it was not disputed that default was made. By the same document the mortgagor also agreed to assign to the mortgagees his book debts as additional security, if demanded. This mortgage was not registered or filed, as required by the Act respecting Mortgages and Sales of Personal Property, R. S. O. ch. 125. It was not suggested, much less contended, that there was anything in the nature of fraud in the transaction of giving and taking this mortgage. It seems that this security was considered insufficient, and on the 18th of July, Cutton again went to Eckenswiler and pressed him for payment or additional security. Eckenswiler then promised that he and his father and mother would come to Toronto on the 22nd of July, and give additional security, but they did not come.

On the 24th of July, Mr. Cutton again went to Clifford, taking with him two gentlemen, Rowan and Smith, with the view of their purchasing the goods from him as the agent of Messrs. McMaster & Co., and on that day Mr. Cutton took possession, pursuant to the provisions in the mortgage. Notwithstanding some discussion as to the sheriff having obtained a key from Mrs. Eckenswiler and entering and formally making a seizure, I find, as a fact, that on the 24th of July Cutton took possession on behalf

of the mortgagees, and immediately placed a bailiff, Henry Torrance, in possession for them, the mortgagees. Torrance took possession and locked the door of the store in which the goods were. Neither Rowan nor Smith purchased. Rowan, however, made an offer of fifty-three cents on the dollar for the goods. On the 26th of July, Mr. Walker, a gentleman in the employment of Messrs. McMaster & Co., was sent by them to Clifford, and on the evening of that day he arrived and found Torrance in possession. He proceeded immediately with stocktaking, and he finished so doing on the 31st of July. Walker says that Bollert was there on the 27th of July.

On the 26th July, 1893, Messrs. McMaster & Co. sold the goods to Bollert at sixty cents on the dollar receiving a note from him at three months for \$1,600. Exhibit A. shews the terms of this sale. It states that the sale was made under the power contained in the mortgage, that the title would be guaranteed, and that any necessary adjustment in the figures would be made when stocktaking. No question was raised as to all this having been honestly done, and Mr. Muldrew, of Messrs. McMaster and Co., in his evidence says that his firm had discounted this note before the time of the seizure by the sheriff. The only contention made against the validity of the mortgage was the fact that it was not registered as required by the statute.

The possession having been taken on behalf of the mortgagees on the 24th of July, and the *fieri facias* not coming to the hands of the sheriff till the 31st of July if ch. 26 of 55 Vict. had not been passed, there could not, I think, be any real question that the finding and determination upon this issue should be in favour of the defendant Bollert for the possession taken was actual possession: see *Ross v. Dunn*, 16 A. R. at p. 561, and cases there referred to. I think I need not refer to any further authority on this point.

At the trial I was asked to allow an amendment of the order and issue by adding one Mr. Scott, said to be the assignee, under the statute, of the plaintiffs, Gillard & Co.,

Judgment. as a co-plaintiff and to treat the trial of the issue as if the
Ferguson, J. action in which the *feri facias* was obtained had been an
action brought by them on behalf of themselves and all
other creditors of Eckenswiler. The object of this motion
was, as I suppose, that the plaintiffs might occupy a
stronger position by reason of the second and fourth sec-
tions of ch. 26 of 55 Vict. (O.).

The assignment to Scott was not made till after the
possession had been taken by McMaster & Co., and the
sale by them to Bollert, followed by possession in Bollert,
and McMaster & Co., were not parties to the action in
which the *feri facias* was obtained. I did not at all see
my way to allowing such an amendment as the one asked,
even if it were assumed that I had power so to do, and it
was contended that I had not such power. But as counsel
for the plaintiff contended that the possession taken by
the mortgagees was not, owing to the provisions of the
third section of ch. 26 of 55 Vict., a good possession, I did
not decide upon the motion for the amendment, but reserved
it till after hearing the evidence.

This third section provides that the "actual and con-
tinued change of possession" in the Act known as the
Chattel Mortgage Act shall be taken to be such change of
possession as is "open and reasonably sufficient to afford
public notice thereof." This provision has by the words
of the provision itself I think, reference only to the "actual
and continued change of possession" mentioned in the
first and fifth sections of R. S. O. ch. 125, and has as I
think no reference whatever to possession taken by a mort-
gagee under his mortgage upon default being made by the
mortgagor. The possession so taken is not so far as I see
mentioned in R. S. O. ch. 125, at all, and I think sec. 3 of
55 Vict. ch. 26, has no bearing upon such possession. The
"actual and continued change of possession" mentioned in
this section 3 is a thing that dispenses with the necessity,
of registration of the mortgage. The possession taken by
the mortgagee upon default seems to cure a want of
compliance with the Act in the preparation of the mort-

gage, where as here the dealing has been entirely honest, ^{Judgment.} and no fraud even suggested. The change of possession ^{Ferguson, J.} mentioned in this sec. 3, and in R. S. O. ch. 125, and the possession taken by the mortgagee pursuant to the terms of his mortgage on default made, are, as it appears to me, entirely different things.

I am still of the opinion that the amendment proposed, if it can properly be called an amendment (so sweeping was its character), was one that should not have been allowed even if it were assumed that upon a trial of an issue of this kind I had the power to allow it, and the motion for this amendment is refused.

The 4th section of 55 Vict. cap. 26, provides that a mortgage or sale declared by R. S. O. cap. 125, to be void as against creditors, etc., shall not, by the subsequent taking possession of the things mortgaged or sold by or on behalf of the mortgagee or bargainee be thereby made valid as against persons who became creditors, purchasers or mortgagees before such taking of possession.

Before the passing of this Act the creditor whose right would be good as against such taking of possession was an execution creditor having his writ in the hands of the sheriff. The second section of the Act shews the enlargement of this that was intended. By that section the benefit is extended to simple contract creditors suing on behalf of themselves and other creditors, and to an assignee for the general benefit of creditors within the meaning of the Act respecting assignments and preferences by insolvent persons and amendments thereto, and the section proceeds, "as well as to creditors having executions against the goods and chattels of the mortgagor or bargainor in the hands of the sheriff or other officer." This, I humbly think, shews the words, "persons who became creditors" in the fourth section, mean persons who become execution creditors, unless they are simple contract creditors suing on behalf of themselves and other creditors as provided for in the second section.

Judgment.
Ferguson, J. I am not prepared to say that the taking of the possession by Messrs. McMaster & Co., in the present case, was not "open and reasonably sufficient to afford public notice thereof," but as I have said, I think that is not important, because the section has no application to it, and it was a taking of possession in the ordinary way and course of such business, in no manner concealed or clouded over, followed by a sale of the goods, and as I think a proper and sufficient taking of possession to be good before the passing of this third section which has, I think, no application to it. The plaintiffs were not execution creditors till after this possession was taken by the mortgagees who sold to the defendant, and I am of the opinion, following the words of the issue before me, that the goods in question were not at the time of the seizure by the sheriff exigible under the execution of the plaintiffs as against the defendant, Bollert.

The finding and judgment upon this issue will be for the reasons I have endeavored to give for the defendant in the issue, and with costs.

Order accordingly.

A. H. F. L.

[CHANCERY DIVISION.]

IN THE MATTER OF ROBERT H. HUNTER'S LICENSE.

Intoxicating Liquors—Liquor License Act—Certificate of Electors—Omission to File in Proper Time—Revocation of License—R. S. O. ch. 194, sec. 11, sub-sec. 4—Ib., sec. 91—53 Vict. ch. 56, sec. 1.

The contravention of the provisions of the Liquor License Act, R. S. O. ch. 194, provided for in sec. 91, must be a wilful or knowing contravention.

Where it appeared that the applicant for a license acted throughout in good faith, but omitted to file before April 1st, with the application, the certificate of the electors required by R. S. O. ch. 194, sec. 11, sub-sec. 4, as amended by 53 Vict. ch. 56, sec. 1; and the board of commissioners, after a fair hearing of the application and all objections made against it, including the omission of the said certificate, which had not been filed until April 25th, in good faith and according to the best of their judgment, granted the license, and the Judge of the County Court adjudged that the license so granted should be revoked, the licensee thereby incurring the penalty of disqualification, prohibition was granted.

The provision that the certificate shall accompany the application at the time of the filing is preemptory.

THIS was a motion on behalf of Robert H. Hunter for Statement. prohibition to His Honour Joseph E. McDougall, Judge of the County Court, of the county of York, to prohibit him from issuing an order herein under sections 91 and 92 of the Liquor License Act, R. S. O. ch. 194, revoking the license theretofore granted to Hunter, in pursuance of the judgment delivered by the said County Court Judge.

The judgment of the learned County Judge was made upon the petition of the Crown Attorney of the county of York, which set up that a license to keep a shop wherein liquors might be sold by retail, was granted under the provisions of the Liquor License Act, R. S. O. ch. 194, to Hunter for the license year 1893-4, in respect to certain premises in the village of East Toronto, in the county of York; that the license had been issued contrary to the provisions of R. S. O. ch. 194, sec. 31, and section 11, sub-sec. 14, as amended by 53 Vict. ch. 56, sec. 1: that that Act expressly required that the application for a tavern or shop license must be filed with the inspector on or before the 1st day of April in any licensed year, and must be

Statement. accompanied by a certificate signed by a majority of the electors entitled to vote at elections for the Legislative Assembly in the polling sub-division in which the premises sought to be licensed, are situated : that in applying for a license as he did on March 28th, 1893, Hunter did not file such a certificate, nor was any such certificate filed by him until on or about April 25th, 1893.

The remaining facts of the case sufficiently appear from the judgment of MEREDITH, J., before whom the motion was made on September 18th, 1893.

E. F. B. Johnston, Q. C., for the motion.

J. J. McLaren, Q. C., contra.

October 4th, 1893. MEREDITH, J. :—

The jurisdiction of the learned County Court Judge depends upon section 91 of the Act, R. S. O. ch. 194, which is as follows :

“ REVOCATION OF LICENSES BY COUNTY JUDGE.

91. “ Upon the complaint of the inspector or the board of license commissioners or the county attorney, that a license has been issued contrary to any of the provisions of this Act, or of any by-law in force in the said municipality, or that the license has been obtained by any fraud, or that the person licensed has been convicted on more than one occasion of any violation of the provisions of section 79 of this Act, or has been convicted on three several occasions of any violation of any of the provisions of this Act, whether the offences in respect of which such convictions were made were the same or different in their character, so long as such convictions were for offences committed on different days, the Judge of the County Court of the county in which any municipality is situate in any part of which the license granted is intended to take effect, shall summon the person to whom such license issued to appear, and shall proceed to hear and determine

the matter of the said complaint in a summary manner, and may upon such hearing, or in default of appearance of the person summoned, determine and adjudge that such license upon any of the causes aforesaid, ought to be revoked, and thereupon shall order and adjudge that the same be revoked and cancelled accordingly, and thereupon the license shall be and become inoperative and of no effect, and the person to whom such license issued shall thereafter, during the full period of two years, be disqualified from obtaining any further or other license under this Act.”

Judgment.
Meredith, J.

And the question is, whether the charge made and found against the applicant, namely, that a shop license had been issued to him contrary to the provisions of sub-sec. 14 of sec. 11—in its present form*—in that a sufficient certificate did not accompany his application for the license when filed, though it was made sufficient by a subsequent certificate presented before the license was granted, is a complaint under section 91, by reason of which, if determined against the applicant, his license must be revoked and he disqualified for two years from obtaining any other license under the Act.

There is now no dispute as to the facts. The application for the license, and all things done to procure it, were made and done in good faith; and the board of commissioners after a fair hearing of the application and all objections made against it, including that now in question, in good faith and according to the best of their judgment, considered the applicant entitled to it, and granted the proper certificate accordingly, and the license was thereupon in due course issued.

Looking at the wording of the sub-section in question, and having regard particularly to the sub-clause (*d*), and to sub-section 21 of this section, and to section 31 of the Act, I am of opinion that the commissioners erred in their conclusion that the Act does not require that the certificate shall accompany the petition at the time of the filing

*See 53 Vict. ch. 56, sec. 1.

Judgment. of the latter, which, under section 31, must be on or before the first day of April; and that they ought accordingly to have refused the application.

Meredith, J.

The express provisions of the Act settle the question, which might well be otherwise raised, whether the provision in question is not merely directory, as under *Danaher v. Peters* and *O'Regan v. Peters*, 17 S. C. R. 44, it must doubtless have been held.

The sub-section 21 is in these words: "(21). The foregoing sub-sections of this section, are declared to be obligatory on the board and inspector, but non-compliance therewith shall not invalidate the action of the board or inspector. Nothing in this sub-section contained, shall authorize the granting of a license contrary to the provisions of sub-section 14."

But it is quite another thing to say that by reason alone of an honest mistake in the construction of a statute, made much less clear by amendments—amendments made evidently without a clear view of their possible bearing upon all parts of the Act—the applicant has incurred the severe and immitigable penalty imposed in section 91.

It is true that the legislature, as I ventured to remark during the argument, has shewn in the Act and its amendments, an intention to err, if it err at all, on the side of severity and stringency rather than leniency or laxity (though that expression does not very aptly convey my meaning), and the Court cannot decline to give full effect to its provisions simply because they may seem excessively harsh. Upon that subject the judgments of Cockburn, C. J., and Archibald, J., in the *Queen v. Vine*, L. R. 6 Q. B. 195, may be referred to.

It is not necessary to go very far back in the history of the Act to discover the cause of that which must at once strike any one as exceedingly hard if the learned Judge's determination is right.

Before the amendment of the sub-section 14, in the year 1890, it provided merely that no license should be granted or transferred for or to premises not then under

license, if a majority of the duly qualified electors of the sub-division petitioned against it on any of the grounds therein referred to. One can very well understand the applicability of section 91 to the case of a license procured in contravention of that provision, having regard to the provision making the certificate of the clerk of the municipality final and conclusive as to the number of electors upon the petition. It would be a reasonable construction of the Act then to hold that it in effect said: "You shall not take a license granted in the face of such a petition; and if you do so knowingly, you shall not only forfeit it but be disqualified from having any other for two years."

According to the learned Judge's view, the amendment of the sub-section would make a mere mistake in the course of procedure provided in the new sub-section an offence as serious in its consequences as the taking of a license in the face of the prohibition it contained in its original form; and as the obtaining of it by fraud; and as the several convictions referred to in section 91: the penalty would be incurred, and the disqualification follow, even though the mistake would substantially be that of the commissioners, and merely an error of judgment in the honest exercise of the duties imposed upon them.

And that it was not an inexcusable error, or a very palpable one, it may be pointed out that if the case were one of a tavern license, the license would not be invalid, though neither petition nor certificate were filed on or before the first day of April, as required by sub-section 2 of section 11, for that sub-section is within the provisions of the first part of section 21, and though "obligatory on the board and inspector," if disregarded, does not invalidate the license. So too, as to all the requirements of the section other than those contained in sub-section 14, many of them of obviously greater importance than that in question. Any difficulty in the way of inability to comply with any of the provisions of the Act by reason of the lateness of the filing of the application, accompanied by the certifi-

Judgment. cate, is sufficiently met by the provision for the holding of adjourned meetings : see *Ex parte Maughan*, 1 Q. B. D. 49.

Meredith, J. In view of these circumstances, the close connection of the first ground of complaint named in section 91 with the other two, each of which if sustained, necessitates the imposition of so serious a penalty as the revocation of the license and disqualification for two years, should have more than ordinary signification ; and, in my opinion, requires me to hold that the learned Judge erred in his construction of the Act in bringing this case, upon the facts as found by him and admitted before me, under the provisions of that section.

It is said that as a general rule no penal consequences are incurred where there has been no personal neglect or default, and a *mens rea* is essential to an offence under a penal enactment unless a contrary intention appears by express language or necessary inference. Though it must be admitted that the maxim *actus non facit reum, nisi mens sit rea* is not as very generally applicable to modern as to older statutes, it being said that a difference has arisen owing to the greater precision of modern enactments ; and that it is impossible now to apply the maxim generally ; that it is necessary to look at the object of each Act to see whether, and how far, knowledge is of the essence of the offence charged.

But so giving it effect, and notwithstanding the mention of the words "knowingly," by amendment as well as originally, in other sections of the Act, and the general stringency of the enactment, I am of opinion that the contravention of the provisions of the Act in the issue of a license provided against in section 91, must be a wilful, or knowing contravention, and cannot include this case : see *Bosley v. Davies*, 1 Q. B. D. 84 ; *Redgate v. Haynes*, *ib.* 89 ; *Dickenson v. Fletcher*, L. R. 9 C. P. 1 ; *Aberdare Local Board v. Hammett*, L. R. 10 Q. B. 162 ; *Mullins v. Collins*, L. R. 9 Q. B. 292 ; *Cundy v. Le Cocq*, 13 Q. B. D. 207 ; *Betts v. Armstead*, 20 Q. E. D. 771, and *The Queen v. Tolson*, 23 Q. B. D. 168. In this way only can, in my opinion, effect be given to the real intention of the legislature.

And if that be so the complaint in question, upon the facts found by the learned Judge and now admitted, was not a complaint such as provided for in section 91, and the determination and intended order of that Judge cannot be in respect of any of the causes named in that section, and therefore prohibition will lie. It is a case in which no jurisdiction is conferred upon a Judge of the County Court; it is the case of a misconstruction of an Act upon a question of jurisdiction, not a case of misconstruction of an Act in a matter within the learned Judge's jurisdiction.

The order for prohibition will go, but it is not a case for costs.

A. H. F. L.

Judgment.

Meredith, J.

[CHANCERY DIVISION.]

MORRIS V. THARLE.

Lien—Mechanics' Lien—Running Account for Material—Prior General Arrangement to get Material from one Person—Time for Filing Lien—R. S. O. ch. 126, sec. 21.

Where there is a prevenient general arrangement, although not binding, between a contractor and a supplier of building material, whereby the former undertakes to procure from the latter all the material required for a particular building contract so that although the prices and quantities are not defined until orders are given and deliveries made, the entire transaction, although it may extend over some months, is linked together by the preliminary understanding on both sides; and a lien for all material so supplied, is, in time, if filed within thirty days of the furnishing of the last item.

Judgment of MEREDITH, J. reversed.

THIS was a mechanic's lien matter. It appeared that on or about November 5th, 1892, the plaintiff was employed by the defendant, H. J. Tharle, to furnish material for the erection of two houses upon the latter's land, and did supply materials for that purpose to the value of \$718.40. On January 5th, 1893, the plaintiff registered

Statement.

Statement. in the proper Registry office a claim of lien for \$692.40, being the balance unpaid of the amount. It appeared from the statement filed by him that the last material supplied was on December 17th, 1892, and that before that date nothing had been supplied since November 24th, 1892.

The official referee, however, found the plaintiff entitled to a lien for the full amount, and one Peter Ryan made a defendant to the proceedings as the legal owner of the lands, and through whom the plaintiff alleged that Tharle had agreed to purchase them, appealed from this holding of the referee to the Judge in Chambers on May 15th, 1893.

Allan McNab, for the plaintiff.

J. Haverson, for the defendant Ryan.

June 1st, 1893. MEREDITH, J.:—

The only question argued upon this appeal was whether the registration of the lien in respect of the materials in question was within the time limited by section 21 of the Act, R. S. O. ch. 126.

The material facts, as I find them, are these: The contractor without entering into any agreement with the respondent, gave him to understand that such materials as he dealt in, required for the buildings in question, would be purchased from him, if as favourable terms could be obtained from him as from other dealers; and accordingly the materials in question were purchased from time to time and were used in the buildings. Just as one would expect, dealing with the respondent for some of the materials first required in carrying out his contract, the contractor would continue to trade with the same dealer so long as he could do so as advantageously as elsewhere.

But there was obviously no contract or agreement legally binding between the parties, except from time to time as

the materials were separately contracted for or ordered and supplied. It was not even the case of a running account between tradesman and customer. Judgment.
Meredith, J.

In these circumstances when would the lien, which the Act expressly and clearly gives, "absolutely cease to exist"?

The 21st section of R. S. O. ch. 126 is that admittedly applicable, and its provisions are:— "In other cases the claim of lien may be registered before or during the progress of the work, or within thirty days from the completion thereof, or from the supplying or placing the machinery."

It is to be observed that the word "materials" is not used in this section, nor in the following one, though it is in all of the sections of the Acts from which they seem to have been taken: see 36 Vict. ch. 27, sec. 4, (O.); 38 Vict. ch. 20, sec. 14, (O.), and R. S. O. 1877, ch. 120, secs. 20 and 21; and there seems room for argument that such a lien as that in question does not cease to exist if registered during the progress of the work, or within thirty days from the completion thereof, and much to be said in support of such a contention, although the following two sections, 23 and 24, would seem to conflict with it. However, the point has been determined in the case of *Hall v. Hogg*, 20 O. R. 13, which I, sitting here, should follow, and therefore need not now further consider it. Under this authority, section 21 must be read as if it expressly required registration within thirty days from the supplying of the materials.

The registration in this case, except as to the last two items of the claim which are not in question, was then too late, unless the case can be brought within the authority of *Lindop v. Martin*, 3 C. L. T. 312.

The ground of that decision seems to have been that, the claim being one by a merchant against his customer upon a "running account" composed of small items obtained from day to day, the contract might be considered as for the whole of the materials, which might be looked upon as supplied, within the meaning of the Act, when the

Judgment. last of them was obtained. I fear I do not, under the
Meredith, J. wording of our Act, though it is plain enough under the
wording of other enactments, quite understand the principle,
though the convenience of the thing is manifest. The true
remedy would seem to me to be in a construction or amend-
ment of the Act which would extend the time till the
expiration of the thirty days after the completion of the
work, for which length of time the lien even now must
exist in favour of the contractor, though when sought to
be enforced by the sub-contractor directly it is held to
be so much more limited.

If it could fairly be said that the claim in question is
one like that in question in *Lindop v. Martin*, I would,
following it, dismiss this appeal; but it is not. Here there
was no running account, or goods furnished from day to
day; each item of the claim rests upon a separate and
distinct contract, without any connection between any one
and any other, beyond the understanding between the two
parties that if such contracts could be satisfactorily made
the contractor would buy from the respondent such ma-
terials to be used in the construction of the buildings as
the respondent dealt in.

And it is not unimportant to observe that, under *Hall v. Hogg*, 20 O. R. 13, the lien in respect of the materials in ques-
tion had absolutely ceased to exist before the last two items,
which are not disputed, were supplied or bargained for, so
that to sustain the finding in question it must be held that
it was revived by the subsequent purchase or in some other
way kept alive through it, though, as before stated, there
was no connecting link between them.

The appeal must, therefore, be allowed.

The plaintiff now moved before the Divisional Court by
way of appeal from the above decision, and the motion
was argued on June 26th, 1893, before BOYD, C., and
FERGUSON, J.

Allan McNab, for the plaintiff. The agreement was to
supply all material for the buildings, and the supplies were

given under that. The account in the books is a running account. *Lindop v. Martin*, 3 C. L. T. 312, governs the case. The lien, therefore, was filed in time within section 21 of the Mechanics' Lien Act, R. S. O. ch. 126; *Hall v. Hogg*, 20 O. R. 13. Argument.

J. Haverson, for the defendant Ryan. I distinguish this case from *Lindop v. Martin*, 3 C. L. T. 312. There each particular shipment was referable to the one contract. Here there was no one contract, but merely a trading from day to day.

September 9th, 1893. BOYD, C.:—

This case is to be considered in the light of those authorities holding that where under a continuous transaction or dealing, several debts accrue, they may become amalgamated and form a single cause of action, as said by Pollock, C. B., in *Re Aykroyd*, 1 Exch. 479, 490. In the case of a running bill with a tradesman the items are generally connected, the first contract being usually made with the understanding that if not paid for until after others have been made, it is to form part of the same debt, so that the several items are to be united into one bill. He proceeds to point out the distinction between cases where the demand is for several distinct things—as for a horse sold, for rent, and for goods sold, and those where the debtor has a bill running from day to day. In the latter case, though each item of goods supplied or work done constitutes a separate contract, so that after the stipulated price becomes due the tradesman could sue for one item, yet the understanding is undoubtedly that it shall be united with other items and form one entire demand: p. 492.

The like principle may be reasonably applied to cases of lien for supplies under the Mechanics' Lien Act with reference to the time for filing the lien. "When one item is connected with another in this sense and the dealing is not intended to terminate with one contract but to be

Judgment.

Boyd, C.

continuous, so that one item if not paid shall be united with another and form one entire demand," [I use the words of Pollock, C. B., in the case cited at p. 493], then the time for filing a lien for the whole may well run from the date of the things last supplied. A concise and admirable formula is given by Mr. Sergeant Manning in the note to *Dodd v. Wigley*, 17 C. B., at p. 115, which covers the manner of dealing germane to this case, viz., when there is one entire *prevenient* governing contract, of which the respective deliveries are merely the execution—the overt acts. And he also illustrates another series of transactions also like the present case. Where goods are ordered of a tradesman on January 1st, and distinct orders for other goods are given on 2nd, 3rd, 4th, etc., if from the previous dealings between the parties, or from general usage or otherwise, it is to be inferred that it was contemplated by the parties that in the event of the dealing continuing the several items should be included in weekly, monthly, quarterly, or yearly bills the result of such an arrangement, and the legal position of the parties seems to be this—upon the delivery and acceptance of the first parcel of goods delivered on January 1st, an entire contract is created and a complete cause of action accrues, the tradesman being under no engagement to sell other goods or to give credit beyond the price of the articles then delivered. When on a subsequent day other goods are delivered and accepted, a new contract arises, not simply a contract to pay for the goods then delivered, but a new entire contract by which the tradesman waives his existing right to payment for the goods delivered on January 1st, and the purchaser agrees to pay for both parcels as upon the entire sale, *et sic toties quoties*. After the successive waiver and extinguishment of each preceding contract, the only subsisting contract and cause of action *ex contractu* will be the last. This exposition of the law was judicially authenticated by Jervis, C. J., in *Bonsey v. Wordsworth*, 18 C. B. 328.

In the present case we find in evidence a *prevenient*

general arrangement by which Tharle, the contractor, undertook to get all his material needed for the King and Springhurst job from the plaintiff Morris. The quantities and prices were not defined till subsequent orders were given and deliveries made, but the entire transaction was linked together by this preliminary understanding on both sides. The letters and billheads of Morris shew that he dealt in cements, fireproofing, and builders' supplies—among other things enumerated are bricks of all kinds, and mortar stains. Pursuant to the general arrangement and understanding the first written contract was with reference to stone and rubble, on November 1st; and the second written contract was with reference to pressed brick, lumber, and cement. Other verbal orders for supplies were given, and the last ordered for the job were some splay bricks and mortar stain which were delivered at the buildings on December 17th. The lien for the whole was filed on January 4th, and was, in my opinion, in time because referable to an entire transaction for the supply of materials for the buildings in question.

The appellant should add all his costs to his claim.

FERGUSON, J.:—

Before any of the goods for and in respect of which the plaintiff claims to be entitled to a lien, were delivered, there was an understanding between the plaintiff and the defendant that the defendant would purchase from the plaintiff such material, of the kinds the plaintiff had for sale, as the defendant might require in the construction of the buildings referred to. This is not, as I understand, disputed, but it is said that this understanding was not legally binding, and I apprehend it was not, for if the parties afterwards disagreed as to the price to be paid or otherwise, there was nothing, so far as I can see, to prevent the defendant from purchasing the material elsewhere, but I do not think this material. There was at the beginning no binding agreement in the case *Lindop v. Martin*, 3 C. L. T.

Judgment. 312, and, as here, the merchant furnished the goods as they
Boyd, C. were required, and it was held that the furnishing of the goods from day to day must be considered as a continuing contract for the whole of which a lien might be enforced, though some of the goods were supplied more than thirty days before the registering of the lien.

It was contended here that because separate bills had been furnished for some of the parcels or quantities of the material, and because there had been a bargaining and agreement as to the price, etc., of them, they must necessarily be separated from the other items of the account, and that they constituted, by being separate and distinct contracts, a clear break in the chain of items that would otherwise have formed or constituted what is known as a running account. I do not see how this is so in the present case unless it is so in all cases where an account is running and the purchaser when or before obtaining further items from the seller inquires in respect to the price to be charged, and he and the seller having agreed upon the price the articles are delivered, the seller sending a bill of these particular articles and their prices, and in such a case there would, I think, be what has been called a "continuing contract," perhaps more accurately expressed by saying a new contract arising upon the delivery of each successive item, which contract would be to pay for the whole up to that period, and either merging or extinguishing the former contracts so arising. I do not see that the case *Hall v. Hogg*, 20 O. R. 13, has any bearing upon the present case.

With all respect for the opinions of those who differ, I do not perceive the absence of the connecting links mentioned by the learned Judge, and I am unable to distinguish this case from the case *Lindop v. Martin*, 3 C. L. T. 312, so far as this consideration has concern. There being some of the items of the materials furnished within the thirty days, I am of the opinion that the appeal should be allowed, and, I think, with costs.

[CHANCERY DIVISION.]

PEARCE V. SHEPPARD.

Negligence—Agister of Horses—Bailee for Hire—Liability—Onus.

The plaintiff's mare while in charge of the defendant under a contract of summer agistment, was killed by falling through the plank covering of a well in the defendant's yard, the existence of which was known to the defendant but not to the plaintiff, and to which yard the mare, with other horses of the defendant, had access from a field in which they were at pasture:—

Held (MEREDITH, J., dissenting), that the plaintiff had, on proof of these facts, given sufficient *prima facie* evidence of negligence to cast the onus on the defendant of shewing that reasonable care which an agister is bound to exercise, and a nonsuit was set aside.

Per BOYD, C.—The test in such cases is not necessarily the care which the agister may exercise as to his own animals. It is, in general, not what any particular man does, but what men as a class would do with similar property as a class.

Per MEREDITH, J.—The agister is not an insurer. The onus of proof of neglect of his duty is on the plaintiff, and had not been satisfied in this case.

THIS was an action brought by Victoria Adelaide Pearce, *Statement.* the wife of Frederick A. Pearce, against Benjamin Sheppard, to recover damages for the alleged negligence of the defendant occasioning the loss of a racing mare belonging to the plaintiff, and alleged in the statement of claim to have been received with her colt by the defendant on or about August 4th, 1892, to be agisted in his pasture-field.

In his statement of defence the defendant alleged that the mare died without any negligence or want of care on his part, and that her death was caused by the plaintiff permitting her and the colt to be left without any attendant in the township of West Flamboro, and by reason of such mare afterwards coming into the barnyard of the defendant, and by her action in pawing at the boards covering the well therein, breaking or removing the boards and falling into the well.

The case came on for trial at Hamilton, upon January 21st, 1893, before ARMOUR, C. J., and a jury.

Lynch-Staunton, for the plaintiff.

Nesbitt, Q. C., and *Bicknell*, for the defendant.

Statement. As stated by BOYD, C., the evidence given by the plaintiff shewed that the mare was left with the defendant to be pastured, and was put in a field with horses of the defendant. It appeared that there was free access from this pasture-field through a lane, to the barnyard in which was a well covered with planks not nailed, and said to be rotten. There was no evidence how long they had been down. The mare was killed by falling into this well, having either pawed away the planks or broken through them.

The learned Chief Justice at the trial was of opinion that there was no evidence of anything wrong about the well, and that there was no special contract between the parties as to pasture, that the plaintiff's agent had seen the place and was aware of its condition, and that the only contract to be inferred was that the defendant was to take the same care of the mare as of his own animals, and that from the evidence he was taking such care, and he nonsuited the plaintiff.

The plaintiff now moved before the Divisional Court to set aside the nonsuit, and for a new trial, and the motion was argued on February 17th, 1893, before BOYD, C., and MEREDITH, J., but on May 10th, 1893, the Court announced that it was divided in opinion and that they would either give judgment then or permit the case to be re-argued before three Judges, and counsel for the plaintiff thereupon elected to re-argue the case.

The re-argument took place on June 6th, 1893, before BOYD, C., and FERGUSON and MEREDITH, JJ.

Lynch-Staunton, and *Ambrose*, for the plaintiff. It was the defendant's duty to see that the well was not rotten, and that it was in proper condition. He took the mare to pasture; he put her in his field, and he let her go out of the field. If the barnyard be held to be a portion of the field, was the well properly covered? There

was negligence, at all events it was a question for the Argument. jury: Oliphant's Law of Horses, 4th ed., p. 241; *Cunningham & Mattinson's*, Prec. of Pleadings, 2nd ed., p. 128; *Henderson v. Barnes*, 32 U. C. R. 176; *Mackenzie v. Ross*, 9 C. & P. 632; Taylor's Law of Evidence, 17th ed., sec. 1173. The learned Judge assumed the functions of the jury. There is no question as to *scienter* in this case.

J. W. Nesbitt, Q.C., for the defendant. The defendant had no higher duty than to take such care of this horse as he would of his own, which, as the evidence shews, had been wandering about the place for years, and nothing had happened. *The Sanitary Commissioners of Gibraltar v. Orfila*, 15 App. Cas. 400, shews that the plaintiff must prove that the defendant was aware of the state of the planks, or was negligent for being in ignorance thereof: *Broadwater v. Blot*, Holt 547. It was for the plaintiff to shew wherein the defendant was negligent. *Mackenzie v. Ross*, 9 C. & P. 632, cited for the plaintiff, was a case of a livery-stable keeper who undertook to keep a dog. All the Court said was that the defendant was bound to return the dog. The case is not like this.

MEREDITH, J., referred to *McLean v. Warnock*, 10 Rettie (Court of Sessions Cases, 4th series) 1052.

September 16th, 1893. BOYD, C.:—

The mare was left with the defendant to be pastured, and was put in a field with horses of the defendant. It appears that there was free access from this pasture-field through a lane to the barnyard in which was a well covered with planks not nailed, and said to be rotten through and through. There is no evidence how long they had been down. The mare was killed by falling into this well, having either pawed away the planks or broken through them. The pasture-field was supplied with a constant stream of water, and with plenty of shade trees, so that there was no need to resort to the barnyard for either shade or water. One witness says that the well as

Judgment.

Boyd, C.

placed needed protection. The husband of the plaintiff visited the farm one Sunday and saw the mare in the field, but did not observe the open approaches through the lane to the barnyard, and knew nothing about the covered well. Is there not in these facts more than a *scintilla* of evidence affecting the defendant with negligence in taking care of the mare? But the learned Chief Justice non-suited at the close of the plaintiff's case.

Persons (*e. g.*, farmers), who take horses or cattle into their fields to graze during the summer, or into their barn and stock yards to feed during the winter, are legally known as "agisters." If a horse so taken for hire is lost by an accident, which the agister could reasonably guard against, he is responsible, and slight evidence of want of proper care may be sufficient for this purpose: *Rooth v. Wilson*, 1 B. & Ald. 59. The test is not necessarily the care which the agister may exercise as to his own animals, for they may be accustomed to a place of danger to which a strange horse would be unused, and he may choose to take risks as to his own property, which would be unwarrantable as to that of another for which he is to be paid. As regards the case in *Oliphant on Horses*, 4th ed., at p. 241, noticed during the argument, it is impossible to gain much light from what is said. The point arose at *Nisi Prius*, and we are told where a horse fell through some rotten boards into a cesspool and was injured, it was doubted by Willes, J., whether the defendant was liable; *Stacey v. Livesay*, C. P. N. P. 1856, cited *Oliphant, ib.*, at p. 241.

Had the Chief Justice in this trial been in that condition of doubt, none the less should the matters of fact have been submitted for the opinion of the jury. As against this *Nisi Prius* case, take the well considered judgment of the Scottish Judges in 1883, in a case much like the present in its circumstances, wherein the law of that country appears to agree with English and Canadian law. A horse grazing for hire was killed by falling into a hole in the field in which it had been placed, which was situated

over the mineral workings, and the farmer was held liable. The judges say that it was the defendant's duty to have examined the field periodically to see whether it was safe for the grazing of horses ; and that the defendant's ignorance of the existence of the hole was no excuse, for it was open to observation, and should have been fenced. Though his own horses were grazing with the other horse similarly treated, Lord Shand said, in so doing he was clearly incurring a great risk, and one to which he was not entitled to expose his neighbour's horses when he was to receive hire for grazing them : *McLean v. Warnock*, 10 Rettie (Court of Sessions Cases, 4th series) 1052. This last point as to relative care, is discussed a good deal in Beven's Law of Negligence, p. 462, and his conclusion is thus expressed : " The test in general is not what any particular man does, but what men as a class would do with similar property as a class." That is, I think, a short and accurate statement of the present general holding of the Courts as compared with the old rule of making the defendant's care of his own things the standard of comparison. See *Turner v. Merrylees*, 8 Times L. R. 695.

Judgment.

Boyd, C.

Having regard to this law, the better course was to have left this case to the jury. Upon the evidence for the plaintiff, it was for them to say whether the mare was received by the defendant on a contract of summer-agistment, that is, to permit her to graze and depasture in his grounds ; whether it was negligent to leave the pasture-field open so that the mare could stray away from it into the barnyard ; whether it was negligent to permit the well in the barnyard to be as it was without examination ; whether the covering of the well was sufficiently secured, and whether the planks were decayed or unsound to the knowledge of the defendant ; or more briefly as quoted in *Broadwater v. Blot*, Holt 547, was the covering of the well in a proper state when the mare was taken ? Did the defendant apply such care and diligence, etc., as the plaintiff was entitled to expect ? All these points were decided by the Judge adversely to the plaintiff, but the

Judgment. evidence is such that a jury might reasonably come to a different conclusion.
Boyd, C.

I would, therefore, set aside the judgment of nonsuit, and remit for a new trial with costs of former trial, and this appeal in any event to the plaintiff: *Searle v. Laverick*, L. R. 9 Q. B. at p. 130.

FERGUSON, J.:—

There was no special contract between the parties. The contract was, as I think, the ordinary contract for the pasturage by the defendant, upon his farm, of the plaintiff's mare at the price of three dollars per month.

The plaintiff's husband and agent had seen the enclosure or enclosures in which the mare was being pastured. I think it not needful that I should say anything of the fields, or as to the means of passing from one to the other, or from one of them to the lane, or from the lane to the barnyard. I think the whole may, upon the evidence, be considered the territory upon and over which the plaintiff's mare might roam while being pastured by the defendant. Although the plaintiff's agent had seen the mare in the pasture, he did not, nor did the plaintiff know anything of the well in the barnyard; its existence was not known to them, or to either of them.

These are, as I think, the premises of fact on which, the point in question is to be considered, to which however, if necessary, may be added the facts that, the defendant had lived for some twelve years upon the farm, his dwelling being within a few yards of the well; that he had for many years, but perhaps not each and every year, pastured horses and cattle for hire upon this farm, and was at the time of the disaster giving rise to this litigation pasturing animals of others and his own animals or some of them in this same enclosure with the plaintiff's mare. The defendant had most ample means of knowledge of all the facts and circumstances relative to the enclosure, and had, no doubt,

as much knowledge of it as farmers generally have of ^{Judgment.} their own farms, if indeed, by reason of his having had ^{Ferguson, J.} the care of the animals of others pasturing them for so many years upon this farm, and part of the time, at least, in this same enclosure, he may not be considered to have had more knowledge of the place than the ordinary knowledge above alluded to. The plaintiff's agent had seen the place once only, which was upon a Sunday, but, as before stated, he did not know of or observe the well in the barnyard.

The contract being as I have stated, the degree of diligence required by law of the defendant was what is called and known as ordinary diligence: *Smith v. Cook*, 1 Q. B. D. 79; *Marfell v. South Wales R. W. Co.*, 8 C. B. N. S. 525; *Broadwater v. Blot*, Holt 547, referred to in the 9th ed. of *Smith's Leading Cases*, vol. 1, at p. 235, where the subject of negligence of bailees is much discussed in the notes under the leading case *Coggs v. Bernard*, Ld. Raym. 909. See also *Umlauf v. Bassett*, 38 Ill. 96, and *Mansfield v. Cole*, 61 Ill. 191, referred to in *Wharton on Negligence*, sec. 723, which are to the effect that a person receiving a horse to pasture for hire is only bound to the use of reasonable care of the property, and only becomes liable for loss or injury to such property where there is a want of such reasonable care. In one of these cases the learned Judges use the words "reasonable care," and in the other they use the words "ordinary care." In neither case was there any special contract.

In the present case, then, I think the defendant was bound to the exercise by him of ordinary care in and about the pasturing of the plaintiff's mare.

The defendant was aware that the animals that were in the enclosure being pastured, amongst others his own animals and the plaintiff's mare, frequented this well in the barnyard and were sometimes upon the covering of the well which was composed of planks that were or had been two inches thick, and which were laid upon timbers, but not spiked or nailed down, but had, if I understand

Judgment. the evidence, a trough upon one end of them and a piece of timber upon the other end. The evidence speaks of some stakes that had been driven for the purpose of keeping the planks, or some of them, in place, but I cannot say that I fully understand this, and it is possibly not very material.

Ferguson, J.

The evidence shews that the plaintiff's mare had been upon this plank covering of the well, and that she fell through it into the well and was killed. This much does not seem to be disputed.

There is evidence, as I think, on which the jury might, not unreasonably, have found that the planks of the covering of the well had become rotten on the underside and thereby weakened to such a degree as to be unfit for the purposes intended. A jury might, I think, reasonably find upon the evidence that the covering of this well had in this way become dangerous to animals being upon or passing over it. I do not say that a jury ought to so find, but only, that if a jury should so find, their finding would not be in violation of reason.

The question then seems to arise that should the jury, so far, be of this opinion, would they be at liberty to go on and say that the defendant was responsible for this state of things and liable to the plaintiff for her loss occasioned thereby?

It was contended that as it was not shewn by any evidence that the defendant was aware of such a condition of the covering of this well there could not be negligence on his part in not changing the condition, or seeing that it was changed.

I do not think that this contention can be sustained, as I am of the opinion that there may well be negligence in not knowing or endeavouring to know a fact or condition of things, and that the consideration of the question of negligence or not, is not always confined to cases in which the party sought to be charged did, or omitted to do something after actual knowledge of the facts, and even if there were no authority on the immediate subject I should have

been of the opinion that if the jury in considering the Judgment. subject were to be of the opinion I have before indicated, Ferguson, J. they might probably go on and find upon the question as to whether or not there had been negligence of the defendant that was the cause of the injury to and loss of the plaintiff, that is to say: Was it or was it not negligent conduct on the part of the defendant in the position in which he was, having the plaintiff's animal and many others under his care with knowledge that the animals frequented this well and were sometimes upon the covering of it, to have this covering in the condition in which, at this point, the jury would, in the events before mentioned, be of the opinion that it was.

The fact that the defendant permitted his own animals to go upon and over the same place and in the same way, is by no means a test. This is a matter which is discussed in Beven on the Law of Negligence, p. 462. At page 520, the same author quotes from Blackstone: "If a man takes in a horse or other cattle to graze and depasture in his grounds which the law calls agistment, he takes them on an implied contract to return them on demand to the owner." Cro. Car. 271. And adds: "At common law the duty of a bailee with whom cattle were left to be fed for reward is to take reasonable care of them. Not 'to take care of and re-deliver them to the bailor.'"

The case *McLean v. Warnock*, 10 Rettie (Court of Sessions Cases, 4th ser.) p. 1052, seems to have been decided upon law not differing from the law of England. The case was different in some respects from the present case in regard to the facts. Yet there seems to me to be many things common to both. In that case it was held that the fact that the defendant did not know of the condition of the place by which the animal was killed was no excuse. The Lord President said it was, in the circumstances of that case, the duty of the defendants to have the field examined periodically to see whether or not it was in a safe condition for the grazing of horses; and Lord Shand said the *onus* was upon the defendant to account for the

Judgment. death of the horse, and that the defendant had not discharged the *onus* because he had not shewn that the horse was killed by a cause for which he was not responsible.

Ferguson, J.

My conclusion is that when the plaintiff gave the evidence that he did give, the *onus* was cast upon the defendant to shew that the mare was killed without any want of reasonable diligence on his part, and I think the case should not have been withdrawn from the consideration of the jury.

The defendant might have been able to shew that the misfortune occurred notwithstanding reasonable diligence on his part, and, if so, the authorities shew, I think, that he would not be liable to the plaintiff; but, the defendant declining to give any evidence to satisfy the *onus* that I, as before stated, think was upon him, then the jury should, I think, have been asked to say whether or not, the plaintiff having given the evidence he did give, there was negligence on the part of the defendant causing or contributing to the cause of the death of the horse and loss to the plaintiff.

There should, I think, be a new trial. The learned Chief Justice was willing to go on with the case and hear the evidence, if any, of the defendant, but the defendant's counsel insisted upon his conceived right to a nonsuit, etc. The costs should, I think, be costs in the cause to the plaintiff in any event.

MEREDITH, J. :—

If Lord Shand's dictum, when sitting as one of the Judges of the Scotch Court of Session in the year 1883, in the case of *McLean v. Warnock*, 10 Rennie (Court of Sessions Cases, 4th series), 1052, that the *onus* is in the first place upon the defendant to account for the death of the horse, could be accepted as an accurate statement of the law of England and of this Province, applicable to this case, unquestionably the learned trial Judge would have erred, and the plaintiff should succeed on this motion; for if such an

onus rest upon the defendant, it is obvious that it has not Judgment.
 been so satisfied as to justify the withdrawing of the case Meredith, J.
 from the jury and dismissing the action.

It is just upon that question—upon whom the onus of proof lies and the nature of that proof—that, in my opinion, the matter in question hinges, and must be determined.

Lord Shand's statement of the law of Scotland in cases of this character was not needful for the determination of the case in which it was expressed; for in that case the unprotected mouth of the pit in the pasture land could be seen; the danger was such that the owner of the land must, or at the least, with ordinary care, ought to have known, and have guarded against. The third finding of the Court was that the defendant knew, or might have known, of the existence of the hole.

I cannot accept that dictum as accurately stating the law of this Province or of England, applicable to the facts of this case, or that case had it occurred here. That law has been too long settled and acted upon to the contrary to warrant my acceptance of such a statement, though from so learned a Judge, even if it had been made respecting the law of England instead of Scotland, or if we were assured that the laws of Scotland and England are alike upon the subject.

An agister is not an insurer; he is bound to take reasonable care, and is liable for injury caused by the want of such care.

The onus of proof of neglect of such his duty was, in this case, upon the plaintiff. There cannot, I think, in the present state of the law here, be any reasonable doubt of that: see *Searle v. Laverick*, L. R. 9 Q. B. 122.

The ground of the action is neglect of ordinary care; the maxim *res ipsa loquitur* does not apply; and the presumption is in favour of all persons exercising care in the performance of these duties.

In some cases proof of the loss by the bailee of the thing bailed may be sufficient evidence of negligence. There seems to have been some conflict of opinion upon

Judgment. this question in the Exchequer Chamber, in *Reeve v. Palmer*,
Meredith, J. 5 C. B. N. S. 91, respecting the loss of a deed by an attorney. But in this case the horse was not lost in that sense.

The question here is, whether the fact that the horse broke through the well and was killed, and that some of the boards, which formed part of the covering of the well, appeared afterwards to be rotten, is sufficient evidence of want of reasonable care, on the defendant's part, to make him answerable in damages for the loss which the plaintiff sustained by the death of the horse. In my opinion, that is not sufficient evidence that the well was insecure, and if it were, it was not enough without some evidence that the defendant knew, or in the exercise of ordinary care, must have known of its insecurity.

Blackburn, J., in delivering the considered judgment of the Court in *Searle v. Laverick*, L. R. 9 Q. B. 122, says (at p. 130) of the *Nisi Prius* ruling of Gibbs, C. J., in *Broadwater v. Blot*, Holt N. P. 547: "But it seems to us that when taken with the contract, the fair conclusion is, that the alleged improper state of the fences was such that the agister, if he took proper care, could not have been ignorant of it; and that it was only mentioned by Gibbs, C. J., as an instance of the absence of due care and diligence."

That covers a view which I have taken of this case throughout, and expressed upon each argument, as to the absence of any reasonable evidence that the defendant knew, or ought to have known, of the alleged insecurity of the covering of the well.

And in the last named case, that learned Chief Justice said: "I admit that particular negligence must be proved by occasion of which the horse was lost, or gross general negligence to which the loss may be ascribed in the absence of the special circumstance which occasioned it."

Unless the agister be an insurer of the safety of his wells, can it be said that the mere fact of some of the planks appearing, when broken, to be rotten, is enough to charge him with want of ordinary care? There are surely circumstances under which such a state of things

might be without want of care, with even more than ordinary care.

Judgment.
Meredith, J.

The case is not one in which the whole facts, respecting the cause of the accident, are in the knowledge of the defendant only, and are of such a character as to call from him an explanation of them which will relieve him from any imputation of negligence. The state of the covering of the well was a matter open to observation by the plaintiff and her witnesses as well as by the defendant; and the vague character of the evidence respecting it is therefore a matter of surprise, if anything more definite would have aided the plaintiff's case.

Then can it be said upon the whole evidence that the pawing of the horse, caused by a mischievous disposition, was not, but the insufficiency of the covering of the well was, the proximate cause of the injury? Is it not as consistent with the whole evidence that the mischief arose from the former as from the latter cause?

As I stated during the arguments, it seems to me futile to contend that there was reasonable evidence of any negligence on the defendant's part because the horses were enabled to pass from the pasture through the lane into the barnyard and shed near the defendant's house; indeed, it might well be said that that was a more than ordinarily careful provision.

It cannot be reasonably contended, that, because the defendant's own horses were cared for in precisely the same way as the plaintiff's, no liability could arise. I did not understand that it was so held, or even so contended for in argument, for doubtless many persons lack greatly a reasonable care of their own property; nor is there, in my opinion, sufficient in the evidence to warrant a finding that the contract was merely to care for the horse in the same manner as the defendant cared for his own; but that such care was bestowed, and that for many years no injury happened, is very strong evidence of reasonable care, and is strengthened by the fact that the plaintiff through her husband saw and knew of the way the horses were

Judgment. allowed to run, without complaint or objection, but, one
Meredith, J. may perhaps surmise, with satisfaction.

Upon the ground that there was no reasonable evidence to submit to the jury of want of reasonable or ordinary care on the part of the defendant, causing the loss, in respect of which damages are claimed, the plaintiff was, in my opinion, properly nonsuited, and this motion might well be dismissed ; but having regard to the strong support which the contrary view has obtained, there being now a numerically equal division of opinion, the plaintiff's course at the trial, was certainly not an unreasonable one ; and he might well be granted a new trial to enable him to give additional evidence if he desires it ; but the price of such indulgence should be payment of the costs of the trial and of this motion ; otherwise, in my opinion, the motion should be dismissed with costs.

A. H. F. L.

[CHANCERY DIVISION.]

RE MCMILLAN.

MCMILLAN V. MCMILLAN ET AL.

Devolution of Estates' Act—Mortgage by Devisee within twelve months from Death—Absence of Caution—R. S. O. ch. 108—54 Vic. ch. 18 (O.)—56 Vic. ch. 20 (O.).

The devisee of real estate, under the will of a testator subject to the Devolution of Estates' Act and amendments, has a transmissible interest in the lands during the twelve months after the death of the testator, pending which time they are vested by the Act in the legal personal representatives.

And where real estate devised by a will so subject, of which letters of administration with the will annexed had been granted during the twelve months succeeding the testator's death, but as to which no caution had ever been registered was, during such period, mortgaged by the devisee in good faith :—

Held, that the mortgage was operative between the devisee and the mortgagee when made, and became fully so as to the land and against the personal representatives when the year expired, in the absence of any warning that it was needed for their purposes.

THIS was an application to vacate an order of a local Master making the applicants parties to this action, and to set aside the service on them of a notice T, on the ground that they were prior mortgagees, and were improperly made parties in the Master's office. Statement.

It appeared that the testator, one Donald D. McMillan, died on October 17th, 1891, having devised the land in question to his son Donald E. McMillan, with a direction to pay debts. The devisee mortgaged the land to the firm of Colin McLaurin & Co., for \$1,200, on May 23rd, 1892. The executors named in the will renounced some months after the death of the testator, and on September 28th, 1892, letters of administration with the will annexed, were granted to the plaintiff Duncan J. McMillan. An administration order was made on December 8th, 1892, and the local Master made the mortgagees parties defendants in his office on February 18th, 1893. No caution was registered under 54 Vic. ch. 18 (O.), or 56 Vic. ch. 20 (O.).

Argument. Against this order, the mortgagees moved and the matter was argued on October 9th, 1893, before BOYD, C.

Hoyles, Q. C., for the motion. The Master erred in making the applicants parties in his office. They are prior incumbrancers, and if added at all should have been made parties when the action was instituted. The mortgagee's title, even if it could have been questioned during the twelve months next after the death of the testator, cannot be questioned now as no caution was registered within the proper time: R. S. O. ch. 108, sec. 4; 54 Vic. ch. 18, secs. 1 & 6 (O.); 56 Vic. ch. 20 (O.); *Reid v. Miller*, 24 U. C. R. 610; *Re McTaggart*, per Robertson, J.* All the money raised on the mortgage was applied in payment of debts of the testator.

W. H. Blake, contra. The mortgage was made within twelve months from the death of the testator. The devisee had no title to convey then. The property was vested in the personal representatives: R. S. O. ch. 108, sec. 4; 54 Vic. ch. 18, sec. 1 (O.). The evidence shews there was a knowledge of debts due by the testator: *Martin v. Magee*, 18 A.R. 384, at p. 390; *Re Wilson and Toronto Incandescent Electric Light Co.*, 20 O. R. at p. 403. Realty and personalty is all one fund to be dealt with by the administrator only under the judgment in *Scott v. Supple*, 23 O. R. at p. 395, during the twelve months after the death, and the devisee cannot interfere with it at all during that time unless under the special circumstances mentioned in the judgment of MacLennan, J. A., in *Martin v. Magee*, 18 A. R. at p. 390. The circumstances here shew the mortgagees' conduct has estopped them from maintaining this application.

Hoyles, Q. C., in reply. The mortgage cannot be treated as a void instrument. The provision as to "assigns," in 54 Vic. ch. 18, sec. 1 (O.), evidently contemplates a transfer during the twelve months. The caution must be registered within that time to affect this mortgage. The

*Not reported.—REP.

devisee here took with a direction to sell and pay debts, Argument.
and he did so : *Corser v. Cartwright*, L. R. 7 H. L. 731 ;
Moore v. Mellish, 3 O. R. 174.

October 11th, 1893. BOYD, C. :—

Testator dies 17th October, 1891, devising land in question to his son Donald, who is to pay all debts of the testator. Devisee mortgages land to McLaurin & Co., on 23rd May, 1892, for \$1,200, duly registered forthwith.

Executors named in the will, renounced "many months, after the death," and on 28th September, 1892, letters of administration *cum test.* were granted to the plaintiff. Duncan J. McMillan. On 8th December, 1892, administration order granted ; 18th February, 1893, the mortgagees were brought in by notice T., as subsequent incumbrancers. They now move against this order as inapplicable to them.

The application depends upon the meaning and effect of the Devolution of Estates' Act and its amendments, R. S. O. ch. 108.

By section 4, land, notwithstanding testamentary disposition, devolves upon the legal personal representatives, subject to the payment of debts.

By 54 Vic. ch. 18, sec. 1 (O.), land not disposed of or conveyed by the executors within twelve months after the death of the testator, shall, at the expiration of the said period, be deemed thenceforward to be vested in the devisees beneficially entitled thereto as such devisees (or their assigns, as the case may be), without any conveyance by the executors, unless the executors cause a caution to be registered against the lands, setting forth that it is or may be necessary for them to sell the lands under their powers and in fulfilment of their duties in that behalf. In this case no such caution was registered.

Section 6 of the Act of 1891, provides that nothing contained in the Act shall lessen the rights of creditors as against any devisee in whom real estate of a deceased debtor has been vested by the executors, or permitted to become vested to the prejudice of such creditors.

Judgment.

Boyd, C.

The Act of 1893, 56 Vic. ch. 20, (O.), provides for registration of the caution after twelve months from the testator's death ; and section 2 declares that the subsequent registration shall have the same effect as if registered within the year, save as regards persons who, in the meantime, may have acquired rights for valuable consideration from or through the devisees.

Section 3 of this last Act declares that the period of estates becoming vested in devisees without conveyance, was not to be delayed beyond the twelve months by reason of probate not having been taken of the will, and that it is not necessary in order to such vesting that probate should have been obtained. These are all the material clauses.

In the result it appears to me that twelve months after the death of the testator, no probate having issued and no caution being registered, the whole estate in the land became vested by operation of the law in the devisee (or his assigns). That is, on the 17th October, 1892, the right of the personal representatives ceased, whether the devisee had or had not conveyed or dealt with the land. The only question is, could he assume to mortgage the estate during the twelve months, as here on the 23rd May, 1892 ? It is argued that the mortgage was utterly void, but I cannot accept this as the true view.

The Act of 1891, by speaking of "assigns," appears to recognize a transmission of interest pending the year by the original devisee, and I see no good reason against holding that the mortgage was perfectly operative as between the devisee and the applicants when it was made. It became fully operative as to the land and as against the personal representatives of the testator when the year expired, in the absence of any warning that the land was needed for their purposes. I am dealing only with the externals of the transaction, *i. e.*, assuming *bona fides*, good consideration, and generally fair dealing on the part of the mortgagee. If these are to be questioned, it is not by bringing the ostensibly prior incumbrancers into the Master's office

pending administration, but by plenary action attacking Judgment.
the security. Boyd, C.

The applicants should succeed ; be discharged from the administration proceedings and have costs of application. I cannot regard the alleged estoppel arising from the conduct of the mortgagees ; that must be deemed as having its force expended on the application to enlarge the time for moving.

G. A. B.

[CHANCERY DIVISION.]

COATSWORTH ET AL. V. CARSON ET AL.

Will—Conversion—Blended Fund—“ My Own Right Heirs ”—Literal Construction.

A testator by his will directed that his trustees should, in certain events after the death of his wife and daughter, sell all his estate, real and personal, and divide the same equally amongst his “ own right heirs,” who might prove their relationship, etc. :—

Held, that the conversion directed created a blended fund derived from realty and personalty to be distributed equally among the same class of persons, and that the words, “ my own right heirs ” signified those who would take real estate as upon an intestacy and not next of kin, and that children of any deceased heirs at law were entitled to share *per stirpes*

THIS was an action brought by Emerson Coatsworth and Statement.
another as his co-trustee against Margaret Jane Carson
and others interested under the will of Edward Ferguson,
deceased.

The testator died leaving a widow and only daughter, and both real and personal estate, and by his will after giving a house and premises to the daughter devised all his other real and personal property to his executors to hold the same for the use of his wife and daughter jointly as long as they both survived and the wife remained unmarried, and in case the wife did not marry and survived

Statement. the daughter, for her use for life ; and in case the daughter survived her mother, for the use of the daughter as her separate estate with power to dispose of the same by will in case she married ; and then proceeded as follows:—"I direct that in case my daughter shall have died without leaving issue, and without having made a will as aforesaid, that my trustees shall (after the death of my wife, if she survive my said daughter) sell all my estate real and personal and divide the same equally amongst my own right heirs who may prove to the satisfaction of my said trustees their relationship within six months from the death of my said wife or daughter whichever may last take place."

The daughter died unmarried in the lifetime of the mother, and the mother then died, without having married again.

At the time of the death of the widow, there were no brothers and sisters of the testator living, but several nephews and nieces, and grand nephews and grand nieces ; and the question to be decided was, whether the nephews and nieces under the words "right heirs" took to the exclusion of the grand nephews and grand nieces, or whether the latter participated and took the shares their parents would have taken had they been living.

The matter came up by way of motion for judgment, and was argued on October 11th, 1893, before BOYD, C.

F. E. Hodgins, appeared for the executors, and stated the case to the Court.

J. Hoskin, Q. C., for the infant grand nephews and grand nieces. When a direction to sell is given which is not imperative, the parties interested take the property as at the time of the conversion: *Lewin on Trusts*, 9th ed. 1083. The period here was at the death of the widow, and the property was realty, and so descended to the "heirs." "Heirs" would include the children of deceased nephews and nieces and the word must receive its strict,

legal, technical and largest meaning: Watson's Compendium, 1371. The law favours an early vesting. The testator had in mind the succession of issue.

J. W. McCullough, in the same interest. The testator's stipulation for the proof of the "relationship" of his heirs shews he anticipated descendants, and was looking forward to the time when some or all of his nephews and nieces would be dead leaving children: *De Beauvoir v. De Beauvoir*, 3 H. L. C. 524; *Boydell v. Golightly*, 14 Sim. 327. The estate vested in the nephews and nieces at the death of the testator, and whether it was real or personal, the children of deceased nephews and nieces took their parents' share. The words "my own right heirs" have already been judicially construed: *Tylee v. Deal*, 19 Gr. 601.

J. R. L. Starr, in same interest referred to *Woodhill v. Thomas*, 18 O. R. 277; *Webster v. Leys*, 28 Gr. 475; *Bayley v. Bishop*, 9 Ves. 6; *Booth v. Booth*, 4 Ves. 399; *Tetlow v. Ashton*, 20 L. J. Ch. 53; *Wright v. Atkyns*, Cooper 111.

W. Mortimer Clark, Q. C., for some of the nieces. The conversion was directed and the property became personalty: *Wood v. Armour*, 12 O. R. 146; *Bolton v. Bailey*, 26 Gr. 361; *Baird v. Baird*, 26 Gr. 367; *Gordon v. Gordon*, L. R. 5 H. L. 254. If the property was converted into personalty, then the children of deceased nephews and nieces are excluded: *Crowther v. Cawthra*, 1 O. R. 128; *Chadbourne v. Chadbourne*, 9 P. R. 317; *Hamilton v. Mills*, 29 Beav. 193.

Hoskin, Q. C., in reply.

October 11, 1893. BOYD, C. :—

I construe the clause in dispute as follows :

Upon the death of daughter and mother (the widow), the clause directs imperatively a sale of all estate real and personal, and then a division equally among "my own right heirs." This imports a conversion out and out, and the formation of a blended fund of money derived from

Judgment. realty and personalty, which is to be equally distributed
Boyd, C. among the same class of persons.

The fund is, I take it, converted into personalty, but it does not follow that it goes to the next of kin. That depends upon the meaning to be given to the words "my own right heirs." The cases are in conflict, but I prefer to follow the decision of *Smith v. Butcher*, 10 Ch. D. 113, where Sir George Jessel held that in a bequest of personalty to the "lawful heirs," the meaning must be a literal one and not as descriptive of the next of kin.

The words here used are peculiar and emphatic "my own right heirs," signifying primarily those who would take real estate as upon an intestacy: see *Farrell v. Cameron*, 29 Gr. at p. 315; *Tylee v. Deal*, 19 Gr. 601, and R. S. O. ch. 109, sec. 31.

This interpretation will let in to share *per stirpes* those who are children of any deceased heirs-at-law and will render intelligible the words of the testator in directing that the relationship of those entitled is to be proved to the satisfaction of the executors within six months from the death of the last survivor of wife or daughter. This provision as was argued is not very pertinent, if only the living nephews and nieces as next of kin should be those to take under the designation of "right heirs."

Costs out of estate. It struck me that too many counsel appeared for the different interests, but this the taxing officer will regard.

G. A. B.

[CHANCERY DIVISION.]

BEAM V. BEAM ET AL.

Life Insurance—Will—Benefit of Wife and Children—Devise to Executors—Creditors' Rights—R. S. O. ch. 136.

Two policies on his life were devised by a testator to his executors to be invested by them as a provision for his wife and children :—

Held, that the testator had declared the insurance to be for the benefit of his wife and children within the meaning of R. S. O. ch. 136, and therefore the proceeds were exempt from the claims of creditors.

Re Lynn—Lynn v. The Toronto General Trusts Co., 20 O. R. 475, followed.

THIS was an action brought by Beatrice P. Beam on Statement. behalf of herself and all other creditors of Morris J. Beam, deceased, against his executors, Joseph G. Beam and H. A. L. White, to have it declared that the proceeds of two insurance policies on the life of the said Morris J. Beam were available to his creditors.

Morris J. Beam, at the time of his death, had the two policies of insurance on his life, and by his will he directed that the moneys payable thereunder should be invested by his executors, and the interest paid to his wife for life, or until the youngest of his three children should attain his majority, for the maintenance and education of the children, and in case the wife should marry again he provided for the manner in which the interest was to be applied for the maintenance and education of the children, and for the division of the principal among them.

The executors declined to use these insurance moneys in payment of creditors.

The matter came up by way of motion for judgment on October 11th, 1893, before BOYD, C.

Moscrip, for the plaintiff. The policies were payable to the executors, administrators and assigns of the insured. The will disposes of the proceeds in the same way as any other asset would have been disposed of, and so they go to

Argument. his estate available to creditors : *Re Lynn—Lynn v. The Toronto General Trusts Co.* 20 O. R. 475. There is a difference between giving insurance moneys to children and making an apportionment, and the only thing that can be done by will under sec. 6 of R. S. O. ch. 136, is the making or altering an apportionment already made.

J. Hoskin, Q. C., for the infant children. This case comes within the statute. Any instrument will be effectual under sec. 5, R. S. O. ch. 136. The Act is an enabling one, and the intent should be given full effect to as long as any object of the trust exists. The disposition of the fund was judicious and similar to that in *Re Lynn*, 20 O. R. 475. The creditors have no claim as against the widow and children.

W. E. Middleton, for the executors. The statute gives power to declare the insurance money for the benefit of the wife and children, and to apportion it among them. This is not clearly either a declaration or an apportionment, as the fund is devised to the executors.

October 11th, 1893. *BOYD, C.* :—

I am bound to decide according to the views propounded in *Re Lynn—Lynn v. The Toronto General Trusts Co.*, 20 O. R. 475, that the testator by will has declared that the insurance moneys are to be invested by the executors for the benefit of his family. By the operation of the statute that excludes this fund from the claims of the creditors. Such must be the judgment in this case.

Costs out of the fund.

G. A. B.

[CHANCERY DIVISION.]

RE THE TORONTO DROP FORGE COMPANY (LIMITED).

Lien—Vendor and Purchaser—Vendor's Lien—Contract Price—Extra Work.

The owner of certain land agreed with a company to build a factory thereon which, when completed, was to be conveyed to the company in return for a certain number of shares.

During the progress of the building certain extra work for the company, agreed to be paid for in cash, became necessary, and was begun before but not completed until after the execution of the conveyance to the company :—

Held, that the owner had no vendor's lien for the value of the extra work.

THIS was an appeal from a judgment of the Master-in-Ordinary. Statement.

The company which was in process of liquidation under winding-up proceedings in the Master's office had, on May 22nd, 1891, made an agreement with one Joseph Barrett, under which the latter was to build a factory according to plans and specifications on certain land owned by him, and on its completion was to convey the building and land to the company in consideration of receiving paid-up stock of the company to the value of the building.

During the progress of the work Barrett did certain work for the company not covered by the original plans and specifications for which he was to be paid in cash \$268, part of which, \$100, was necessitated by an alteration in the specifications for an enlargement of the boiler house ; and when the building was completed it was duly conveyed to the company by Barrett on March 14th, 1892, and sixty-eight shares were assigned to trustees named by him for his benefit as payment therefor.

One Charles Millar, was a judgment creditor of Barrett, and had placed a *fi. fa.* lands in the hands of the sheriff between the date of the agreement and the date of the conveyance, and claimed in the Master's office* that Bar-

* All parties consented to submit the matter to the Master for adjudication.—REP.

Statement. rett had a vendor's lien on the property conveyed at least to the extent of \$100, which was the value of the extra work performed upon the building under the altered specifications, which had not been paid, and that as the company had agreed with Barrett to pay Millar \$100 in satisfaction of his execution out of the \$268 then due Barrett, he (Millar) stood in the same position as Barrett did as to that \$100, and was therefore entitled to a lien on that amount, and he was entitled to be paid out of the proceeds of the land.

September 18, 1893. THE MASTER-IN-ORDINARY. (After setting out the facts). I am satisfied the vendor could not have been compelled to convey the property to the company without his being paid the reasonable value of his extra work, for the *enlarged* boiler house became incorporated with and formed part of the property to be conveyed. I think that the vendor would be entitled to a lien on the property to the extent of the value of the enlargement of the boiler house over and above the amount of the paid up shares he was to receive pursuant to the agreement.

At the time this extra work was being done, and before the conveyance was made to the company, Millar had placed an execution against the lands of the vendor Barrett in the hands of the sheriff. The material dates are—agreement between Barrett and the company, May 22nd, 1891. *Fi. fa.* lands *Millar v. Barrett*, September 1st, 1891, renewed up to and on August 26th, 1893. Conveyance *Barrett et ux* to this company March 14th, 1892, registered July 28th, 1892.

Millar's execution attached to whatever interest or claim the vendor Barrett had in the property, and Millar thereby acquired a charge on the paid-up shares, and on the money payment for the extra size of the boiler house, just as effectually as if the original agreement had provided the part payment for the property should be paid-up shares and part cash. The company had notice of Millar's

execution, and could not, by taking a conveyance from Barrett and paying him money for the value of the extra work, oust or defeat the charge which had attached by virtue of Millar's execution on what Barrett was to receive from the company.

The value of the extra size of the boiler house has been fixed by the parties at \$100, and I find that Millar's execution became a charge thereon in the hands of the company, and that the company could not pay that amount to Barrett without satisfying the execution charge. The amount now due to Millar is \$75, with interest from the 16th April, amounting to \$6.37, in all \$81.37, and this amount I direct the liquidator to pay, so as to have the property sold to the purchaser freed from Millar's execution.

* * * * *

From this judgment the liquidator appealed, and the appeal was argued on October 12th, 1893, before BOYD, C.

Hoyles, Q. C., for the appeal. The extra work may have been done, but Barrett is not entitled to any vendor's lien for the value of it. The original contract did not contemplate it, and the nature of the transaction excludes it: *In re Brentwood Brick and Coal Co.*, 4 Ch. D. 562; *Scott v. Benedict*, 5 O. R. 1. The contract for the extras was a new and separate contract, and the contractor must rely on that contract alone to recover: *Hudson on Building Contracts*, 331; *Emden on Leases and Building Contracts*, 219. Barrett could not have set up as a defence in a specific performance action that he was not paid for his extras: *Faulkner v. Llewellyn*, 31 L. J. Ch. 549. A vendor's interest in land, after he has made a contract to sell, is not exigible: *Parke v. Riley*, 12 Gr. 69; *Armour on Titles*, 259; *Lodge v. Lysley*, 4 Sim., at p. 75.

Riddell, contra. This is not the ordinary case of a sale of land, and *Parke v. Riley*, does not apply. There was a building to be put up and until that was done Barrett had an interest which was exigible. This is not a case of

Judgment.

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Ordinary.

Argument. extras, the actual specifications were changed, and the value of the work was on the same footing as the original price, and so there was a vendor's lien to the value of the work put into the building. The company could not have compelled the execution and delivery of the deed until the extra amount was paid in money. The nature of a vendor's lien is shewn in *Jones on Liens*, vol. 2, par. 1082-1083. A creditor of a vendor has a right to enforce the lien if the amount is left in the hands of the vendee for the purpose of paying the creditor, and the evidence shews that was the case here. I refer to *Jones on Liens*, par. 1094; *Francis v. Wells*, 2 Col. 660; *Carver v. Eads*, 65 Ala. 190; *Young v. Hawkins*, 74 Ala. 370; *A. G. De L'Isle v. Moss*, 34 La. 164; *Thompson v. Thompson*, 3 La. (Tenn.) 126; *Cordova v. Hood*, 17 Wallace, U. S. S. Ct. 1; *Tysen v. Wabash R. W. Co.*, 15 Fed. R. 763.

Hoyles, Q. C., in reply. The cases cited are not good in principle, and are referred to as opposed to some of the best known rules which govern the relation of vendor and purchaser in 2 *Warvelle on Vendors*, 704.

October 14th, 1893. **BOYD, C.**:—

In *Walker v. Ware, etc., R. W. Co.*, L. R. 1 Eq. 198, Lord Romilly says: "If there had been two distinct agreements, one for the sale of the land at a certain price, and the other for compensation in respect of other matters which might not have been thought of at the time of the first agreement, the two sums would have been separate and distinct"; so that the owner of the land would not be entitled to a vendor's lien for the whole.

That principle of law as to lien of vendors is pertinent to the present case.

The papers shew an agreement by Barrett of 22nd May, 1891, by which he agreed to erect a factory suitable for the business of the company now in liquidation, on lands owned by him; and that on its completion he would convey to the company in consideration of the allotment

of paid up capital stock to the amount of the cost of the factory, to be ascertained by reference to the plans, tenders, etc., by Barrett and the directorate before building operations began. The value, however, was not actually ascertained till after the completion of the factory ; it was then valued according to the original plans and specifications at \$6,800.

Judgment.

Boyd, C.

The land was subject to a prior mortgage for \$3,000, and I gather that no value was put upon the land apart from the building to be constructed. The conveyance was made by Barrett to the company on 14th March, 1892 (the building being finished), in consideration of \$1, but the real consideration was received by Barrett in the shape of an allotment of \$6,800 stock paid up.

During the progress of the work, Barrett had to sink a well in order to get water for the works, and to dig a drain to keep the foundation dry ; and he was directed to increase the size of the boiler house by about four feet ; and he also did some grading. These additions or "extras," as they are called in the evidence, were not originally contemplated—the need for them developed during the course of the work, and part of them was done after the execution of the conveyance.

The matter was brought before the annual meeting of the shareholders in April, 1892, and the report of the directors was adopted, wherein the whole transaction was set forth, and in particular this statement was made, " Mr. Galley has valued the building according to the original specifications, at the sum of \$6,800. Mr. Barrett has also dug a well at the factory, and also a drain, and changes from the original specifications were made in the erection of a boiler house ; for the extras, your directors have agreed to pay Mr. Barrett \$268 cash, and sixty-eight shares of the company have been allotted to him in payment for the building."

At this meeting, Mr. Barrett was present as a member of the company took part in the proceedings and is of course bound by this report.

Judgment.

Boyd, C.

Thus the distinct parts of the transaction are clearly manifest ; the first, the purchase of a building according to specifications at a cost of \$6,800, which was carried out by the allotment of stock ; second, a subsequent doing of work which was begun before and completed after the execution of the conveyance, for which \$268 in cash was to be paid.

To my mind the whole circumstances of the case are repugnant to the existence of a vendor's lien.

There was really no price being paid for the land ; what was to be paid for in stock, was the building to be erected on the land : *In re Brentwood Brick and Coal Co.*, 4 Ch. D. 562.

The subsidiary subsequent arrangement for the payment in money in return for the extra work, was not a part of the scheme, and was not validated by the company till after the conveyance had been duly executed. I do not see how, on this evidence and this state of facts, Barrett could himself have claimed a vendor's lien for any part of the \$268, and if not, there is nothing to enure to his execution creditor, the respondent Millar. This execution against lands was not put into the hands of the sheriff till first September, 1891, and as there was then the prior agreement to convey to the company upon the erection of the building, it was not argued that the execution could then attach : *Parke v. Riley*, 12 Gr. 69, and 3 E. & A. 215.

The appeal should be allowed with costs as in Chambers.

G. A. B.

[CHANCERY DIVISION.]

RE DENISON.

WALDIE V. DENISON ET AL.

Tenant for Life and Remainderman—Payment of Taxes—Productive and Unproductive Property.

As between a tenant for life in possession and a remainderman of property, part of which is productive and part unproductive, the life tenant will not be permitted to receive rents from part of the property while he allows taxes to accumulate on the vacant portion.

Order made for a receiver of the estate of the tenant for life to pay the arrears of taxes out of the rents.

THIS was an application by the receiver of the rents Statement. and profits of the real estate of one Charles Leslie Denison, who was the tenant for life of the land hereinafter mentioned, for a direction from the Court with respect to certain moneys in his hands, and as to certain unpaid taxes on the property in question.

The said Charles Leslie Denison was the tenant for life with remainder to his children of land in the city of Toronto, under the following clause in his father's will:—
 "I also give to my son Charles Leslie Denison all * * *. This piece of land I give to him during his natural life, and for him to leave it to any of his children he may please, etc." Portions of the land were leased to tenants, producing rents, portions were vacant, and other portions had been sold: both leases and sales being made under orders of Court. A considerable sum of money had accumulated in Court from the rents of the portions leased and the proceeds of sales, and no taxes were due upon the portions producing the rents, but arrears of taxes had accumulated on the vacant portions.

The tenant for life and his creditors claimed that he was entitled to the rents of the leased portions without being obliged to pay the taxes on the remainder, and his infant children claimed that he as life tenant was bound to keep down all the annual charges on the whole out of the annual income for rents.

Argument.

The matter came up by way of petition on the 8th of November, 1893, before BOYD, C.

W. H. Blake, the receiver in person stated the case to the Court, and asked for directions.

R. A. Grant, for the tenant for life and the creditors. The land is not all one lot, but has been divided into lots by a plan. The taxes in arrear are not assessed against the lands producing the rents, so there is a fund arising from the surplus rents on which there is no charge properly payable by the life tenant, but to which he is entitled, and which should go to his creditors. [BOYD, C.—Can the tenant for life take all the rents from the rent producing part, and allow the rest to be sold for taxes?] All the charges on the portions producing the rents are paid, and there is no obligation on the life tenant to remove charges against the other portions at his own expense, and for the benefit of others. I refer to *In re Baring—Jeune v. Baring* [1893] 1 Ch. 61; *In re Courtier*, 34 Ch. D. 136; *In re Hotchkys—Freke v. Calmady*, 32 Ch. D. 408.

J. Hoskin, Q. C., for the infants. The cases cited were all in reference to repairs. None of them decide that the tenant for life is not bound to make such repairs as will comply with covenants for repair entered into by his predecessor in title. None of them go so far as to except taxes from being a charge on the income from the property. Taxes are not under the control of any testator or predecessor in title, and they can be collected out of the rents by the municipal government assessing them. [BOYD, C.—But it is contended that there are no taxes due on the portions producing the rents]. The tenant for life must discharge all rates: *Lewin on Trusts*, 9th ed., 768. Here the tenant for life took the whole property subject to that burden, and he cannot parcel it out and take the productive portion and let the unproductive portion be sacrificed. He must do equity, and take the whole property and whole burden. In *In re Hotchkys*, 32 Ch. D. 408, there were two separate estates. Here the receiver was appointed for the whole property

at the instance of the creditors. He is a trustee, and must keep down all annual charges out of any funds in his hands. Argument.

R. A. Grant, in reply. The two estates in *Re Hotchkys* passed under the one devise.

November 8th, 1893. BOYD, C. :—

The person entitled to possession is the person to pay the taxes yearly chargeable on the property, and the fund out of which taxes are ordinarily payable is the rents of the land : *Fountaine v. Pellet*, 1 Ves. Jr. 337, and R. S. O. ch. 193, s. 24.

This charge for taxes is one of the things which should be paid by the tenant for life, so as to protect the property for the remaindermen. As between him and the remaindermen the Court would not allow him to receive rents from part of the property, while he allows taxes to accumulate on another part.

The fund is now in the hands of the Court through the receiver, and the equity of the infants to have the taxes paid out of the fund is superior to the claim of execution and other creditors of the tenant for life. There is nothing in the will to interfere with these relations between the tenant for life and remaindermen, and my order will be so to apply the fund in hand derived from the rents.

G. A. B.

[CHANCERY DIVISION.]

RE SUN LITHOGRAPHING CO.

Company—Winding-up Act—R. S. C. ch. 129—Compromise—Dissentient Minority—Liquidator's Approval.

There is no power given by the Winding-up Act R. S. C. ch. 129, to enforce a compromise upon dissentient minorities of creditors.

Semble, a liquidator cannot be compelled to consent to a compromise, and even when a compromise is recommended by a liquidator it may be frustrated by an opposing minority.

Statement. THIS was an appeal from a judgment of the Master in Ordinary.

The company was in process of liquidation in the Master's office under a winding-up order, and proceedings were being taken before him when it was objected that the matter should not proceed further, because at a meeting of creditors of the company two resolutions had been passed at the instance of a large majority in value of said creditors (1) that litigation in respect to the affairs of the company should not be proceeded with further, and (2) accepting a proposed offer for settlement of the claim of one Farquhar, the largest creditor of the company.

It appeared that at the meeting at which these two resolutions were adopted they had been resisted and voted against by a minority in value but majority in number of the creditors, and that neither the resolutions nor the proposal offer nor the report made thereon had been recommended to the Court by the liquidator.

The Master gave the following judgment :

September 28th, 1893. THE MASTER-IN-ORDINARY :—

A reference to Emden's Practice in winding-up cases would have satisfied the parties that a motion to stay these proceedings, and to sanction the action of the meeting of creditors on the proposed compromise of Charles Farquhar's claim, could not be granted.

The English Act of 1870 (33 & 34 Vic. ch. 104) giving the Court power to bind a dissentient minority of creditors, has not been introduced into the Canadian Winding-up Act; and I apprehend from that Act that such a minority of creditors could not be controlled in regard to their legal rights except by a statutory enactment.

Judgment.

Master in
Ordinary.

But even if that power existed here, Emden indicates that the notice calling the meeting of creditors should clearly state what is the proposed business of the meeting; and the forms given on pages 663 and 667 shew that the object or purpose for which a meeting of creditors is called should be set forth in the notice. And on page 445 it is stated that circulars as to the compromise of a claim are to be settled by the Judge's Chief Clerk, and are to contain full particulars of the nature of the proposed compromise. It is admitted here that no intimation of any proposed compromise of Charles Farquhar's claim was given in the notice calling the meeting.

Besides this application lacks another essential prerequisite--the liquidator's recommendation or assent. Emden says (p. 445) that every application for the sanction of a Judge to a compromise must be supported by the affidavit of the liquidator shewing that he has investigated the matter, and stating his belief that the proposed compromise will be beneficial to the company, giving also his reasons for such belief. There is no such affidavit or recommendation from the liquidator in this case. On the contrary, he has been examined by the applicant, and he stated before me that he did not go into the matter of this proposed compromise, and that he did not recommend its acceptance, as he did not consider it within his province. His solicitors, however, acted as indicated by the practice in not bringing the compromise before the Court unless he could recommend it.

In *In re East of England Banking Company, Pearson's Case*, L. R. 7 Ch. 309, the Lords Justices held that a compromise must have the consent of the liquidator as well as

Judgment.
Master in
Ordinary.

the approval of the Court, and that there was no jurisdiction in the Court to order a liquidator to accept a compromise. This was followed in *Re The International Contract Co., Hankey's Case*, 26 L. T. N. S. 358, where the creditor's petition asking for the Court's sanction of a compromise was dismissed with costs.

The Court (says Emden, p. 449) will require to be satisfied that the proposed arrangement is fair and equitable, and it will not sanction a scheme (under the Act of 1870) merely because it has been approved of by a large majority of the creditors. This view is sustained by the observations of Bowen, L.J., in *In re Alabama, etc., R. W. Co.* [1891] 1 Ch. at p. 243, where he says: "It would be improper for the Court to allow an arrangement to be forced on any class of creditors, if the arrangement cannot reasonably be supposed by sensible business people to be for the benefit of that class as such, otherwise the sanction of the Court would be a sanction to what would be a scheme of confiscation."

For the reasons above indicated the motion must be refused with costs.

From this judgment certain of the creditors appealed, and the appeal was argued on October 13th, 1893, before BOYD, C.

Arnoldi, Q.C., for the appeal. The offer of settlement made should be accepted, and the minority creditors must acquiesce where there is a majority in value in favour of it. The larger interest must be protected, particularly where the proceedings will necessarily incur costs, most likely payable out of the estate, so that my clients who are preferred creditors, will virtually be paying for the privilege of having their own claims contested. Section 19 R. S. C. ch. 129, is the one to be considered. The Court has power to stay proceedings: section 18. Section 161 of the Imperial Act of 1862, 25 & 26 Vic. ch. 89, relates to reconstruction of companies, and is not

applicable to this case. I rely on *In re The English, etc.*, Argument. *Bank*, 9 Times L. R. 556; *In re Alabama, etc., R. W. Co.* [1891] 1 Ch. 213; *Re Worcester, Tenbury & Ludlow R. W. Co.*, 3 DeG. & S. 189.

J. R. Roaf, appeared in the same interest for other creditors.

Kilmer, for the liquidator, contra. The effect of accepting the settlement offered, would be to leave nothing whatever for the minority. The evidence shews the appellants want the whole estate. The Master was right in not giving effect to the settlement, even if he had jurisdiction which he has not: *In re Albert Life Assurance Co.*, L. R. 6 Ch. 381. Sections 33 and 61 of our statute, R. S. C. 129, are the corresponding sections to sections 160 and 159 respectively of the English Act of 1862, 25 & 26 Vic. ch. 89 (Imp.) The creditors should vote *bonâ fide* in the interest of creditors: *In re Wedgwood Coal and Iron Co.*, 6 Ch. D. 627; *In re Page*, 2 Ch. D. 323.

Arnoldi, Q. C., in reply. Section 159 of the English Act relates to a voluntary winding-up.

October 13th, 1893. BOYD, C.:—

Read by the light of English decisions on sections analogous to 33 and 61 of our Winding-up Act, R. S. C. ch. 129 (*i.e.*, sections 159 and 160 of the Companies' Act of 1862) there is no power to enforce a compromise upon dissentient minorities, and there is no power to compel the liquidator to consent to a compromise: *In re Albert Life Assurance Co.*, L. R. 6 Ch. 381; and *In re East of England Banking Co., Pearson's Case*, L. R. 7 Ch. 309. The Court has not jurisdiction to compromise, *per se*: as expressed by James, L. J., in the case last cited, p. 311: "The only power is in the liquidator with the sanction of the Court, and there is no power in the Court to order a compromise whether the liquidator recommends it or not."

To remedy this a statute was passed in England [The Companies' Act of 1870, 33 & 34 Vic., ch. 104 (Imp.)],

Judgment. not in force or enacted here, by which a statutory majority of creditors is able to bind a minority, and upon this Act proceeded the decision relied on by Mr. Arnoldi, *In re The English, etc., Bank*, 9 Times L. R. 556.

Boyd, C.

This point goes to the merits of the appeal and shews that any feasible scheme of compromise ought at least to be initiated or recommended by the liquidator before it is worth while to enter upon its consideration, but even when thus introduced all may be frustrated by an opposing minority.

Without the sanction of the liquidator I am of opinion that the Master exercised a reasonable discretion in refusing to entertain the merits of the proposed compromise, with which an appellate tribunal ought not to interfere.

The section invoked by the appellant, section 9, is emphatically of a wide discretionary scope in all matters that can be governed by the wishes of the creditors, or in which it may be useful to have regard to the wishes of the creditors; but it is not meant to empower the enforcement of a compromise differently from the specific provisions relating to that subject. In this case the evidence before the Master indicated that a substantial minority opposed a compromise, and that, for one sufficient reason because it would leave them without dividend, as the creditors preferred by the compromise would absorb all the assets.

I dismiss the appeal with costs.

G. A. B.

[CHANCERY DIVISION.]

RE THE CANADIAN PACIFIC RAILWAY COMPANY

AND

THE NATIONAL CLUB.

Devolution of Estates' Act—Lease—Covenant to Renew—Power of Executor of Lessor to Execute Renewal of Lease.

Under the Devolution of Estates' Act, the executor of a deceased lessor can make a valid renewal of a lease pursuant to the covenant of the testator to renew.

THIS was an application under the Vendor and Purchaser Statement. Act R. S. O. ch. 112, by the National Club as purchasers against the Canadian Pacific Railway Company of Canada as vendors.

The company had agreed to assign a certain lease free from incumbrances to the club, and the question to be decided by the Court was whether an executor of a deceased owner with the approval of the Official Guardian under the Devolution of Estates' Act, the land having been devised to infants, could make a valid renewal of a lease in pursuance of a covenant to renew by the lessor contained in the lease; or whether it was necessary to make an application under R. S. O. ch. 137, sec. 3, to bind the infants.

The petition was argued on October 25th, 1893, before MEREDITH, J.

Bristol, for the purchasers. The Devolution of Estates' Act does not empower an executor to make a lease under the circumstances occurring here. He may pay debts but cannot lease, and the Official Guardian cannot approve, under section 8 of the Act, of such a proceeding. This is not a carrying out of a contract already made, as provided for in section 4, but the making of a new contract. *Re Jackes*, 3 U. C. L. J. N. S. 70, is a case in point if the Devolution of Estates' Act does not apply.

Argument.

E. D. Armour, Q. C., for the vendors. The property is vested in the executor. Section 4 shews how it is to be distributed, but subject to any contract. Here the property passed to the executor subject to the contract to renew under the covenant. He is liable on all covenants respecting it. The covenant to renew binds the heirs and assigns of the lessors, and section 10 makes the personal representative the "heirs and assigns," and so the executor is liable. If there were no infants he could lease: *Martin v. Magee*, 18 A. R. 384. Where there are infants he still can lease, but the approval of the Guardian is necessary. The executor has the whole estate and can convey. A trustee's estate passes to personal representatives: *In re Pilling's Trusts*, 26 Ch. D. 432. The land is to be dealt with as personalty: *Plomley v. Shepherd*, [1891] A. C. 244. In England if a renewal was required where infants were concerned the lessee had to file a bill and have a guardian appointed. But under 11 Geo. 4th & 1 Wm. 4th, ch. 65, sec. 16, a summary application may be made to enable the guardian to execute the lease. That Act is in force here, *Re Jackes*; but instead of making an application the Official Guardian can act in all cases on application to him under the Devolution of Estates' Act, sec. 8. The lease is advisable in the interest of all parties. The Official Guardian's approval is sufficient. The executor can dispose of the whole property to answer the obligations of the deceased. He can sell to pay debts: *Martin v. Magee*, 18 A. R. at p. 398, and so he should be able to fulfil the obligation to lease in specie.

Bristol, in reply. The words "sale or conveyance" as used in section 8 of the Act do not cover "lease."

October 26, 1893. MEREDITH, J.:—

The single question raised by this petition is whether the executor can make a valid renewal of the lease in question in accordance with the covenant of the testatrix to renew.

The provisions of "The Devolution of Estates' Act" are applicable, but not the amendments made since the death of the testatrix, on the fourth day of November, 1890, which have been held to have a prospective effect only. Judgment.
Meredith. J.

Under the provisions of that Act, the legal estate in the property devolved upon and is now vested in the executor, but, after the fulfilment of his duties respecting it, he is a trustee of it for the persons beneficially entitled to it: *Martin v. Magee*, 19 O. R. 705, and 18 A. R. 384: but any disposition of it by him in breach of his trust would be valid, unless the person taking it had notice, or could be charged with knowledge of the breach.

Before the Act, the legal personal representative, even when given no express power respecting it by a testator, was far from being wholly unconcerned in the lands of a testator or intestate; among other things, he could be sued for breach of covenants respecting them, and they could be reached through him for the satisfaction of debts, and under the enactment now contained in section 26 of ch. 110 R. S. O. (1887), he was bound to convey real estate, or any estate or interest therein, which the testator or intestate had contracted in writing to sell and convey; see also sections 14, 16, 20, 21, 23, 24 and 25 of this Act, and section 10 of ch. 108, and section 22 of ch. 132.

Now, in this case, what the executor proposes to do is to execute a renewal of the lease in accordance with the covenant of the testatrix—who was a married woman—the legal estate being vested in him, and he being liable, as such executor, for breach of the covenant if the lease be not renewed: see *Williams on Executors*, 7th ed., pp. 1,749 *et seq.*; and section 10 of ch. 108, and section 22 of ch. 132, R. S. O. (1887).

It is difficult to understand why in these circumstances he cannot make a valid renewal of the lease.

By section 9 of "The Devolution of Estates' Act," power is given to the legal personal representative to dispose of and otherwise deal with all real property vested in him under the provisions of the Act with all the like incidents,

Judgment. but subject to all the like rights, equities and obligations, Meredith, J. as if the same were personal property vested in him.

If the property were leasehold instead of freehold, a legal personal representative might always have disposed of it absolutely, or by way of underlease, and have made a good title even against a specific legatee, unless the disposition was fraudulent: see *Williams on Executors* 7th ed., pp. 939 *et seq.*: by section 9 of the Act, he has now the like power to renew a lease of real property.

If the renewal of the lease would be in violation of the rights of anyone beneficially entitled to the property, doubtless the Court would prevent any such breach of trust, and would set aside the lease if taken with notice of the breach of trust, which, with the trustees' liability to account, is the protection that the beneficiaries have.

In my opinion, the question whether the executor has power to grant the renewal of the lease must be answered in the affirmative.

It is not necessary to consider whether, there being infants concerned in the property, the consent or approval of the Official Guardian to the lease is necessary under section 8, he having already approved of and consented to it. But it is said to be the practice to obtain it, and to be a practice having the express approval of the Court in support of it, though I have been unable to find any case reported or unreported shewing this.

G. A. B.

[CHANCERY DIVISION.]

IN RE BRAZILL V. JOHNS.

Prohibition—Time of Application for—Division Court—New Trial—Jurisdiction—Action on Promissory Note dated at one Place but made at another—R. S. O. ch. 51, sec. 86.

The defendant in an action in the First Division Court of the county of York, brought upon a promissory note dated "Toronto," but actually made at Wiarton, filed a notice disputing the jurisdiction. Judgment, however, was given in the action against him in his absence, and he moved for and obtained a new trial, paying the money into Court as a condition, and afterwards applied for an order of transference which was refused. Before the new trial, he applied for a prohibition :—

Held, that by moving for a new trial and paying the money into Court, the defendant had not waived his right, and the want of jurisdiction being clear, prohibition should be granted.

If the right to prohibition existed, it is optional with the defendant to apply at the outset of the Division Court proceedings, or he may wait till the latest stage of appeal so long as there is anything to prohibit.

Judgment of MEREDITH, J. reversed.

THIS was a motion before the Divisional Court by way of appeal from an order made by MEREDITH, J., refusing an application for prohibition to the Judge of the first Division Court of the county of York. Statement.

The action in the Division Court was upon a promissory note, dated Toronto, August 29th, 1888, for \$99, but, in fact, made at Wiarton, by the defendant, John Johns, payable four months after date to the plaintiff, F. P. Brazill. It appeared that the defendant caused a dispute note to be entered in the action, but took no further steps to dispute the jurisdiction until the very day when the action came on for trial, namely, March 21st, 1893, when he telegraphed to some Toronto solicitors to appear for him and dispute jurisdiction, but did not instruct them in any way as to the facts of the case. When the case was called for trial, the solicitors attended and objected to the jurisdiction of the Court, and asked for a week's enlargement, in order to produce evidence to shew that there was no jurisdiction. But this was refused, and there being no evidence for the defendant, judgment was given for the plaintiff.

Upon March 24th, the defendant applied for a new trial upon the ground that the note had been paid in full; and

Statement. also that the note was made at the village of Wiarton, and not at the city of Toronto, as expressed in the note, and to have the action transferred from Toronto to Wiarton, the defendant stating in the affidavits used upon the motion for the prohibition, that his object in moving for a new trial, and paying the money into Court, was solely to put himself in a position to take the proper objection to the jurisdiction.

A new trial was granted upon payment into Court within two weeks of the amount of the note and costs, and the defendant accordingly paid the money into Court.

The action being so reinstated, upon April 24th, 1893, the defendant made the application to transfer the action, but it was dismissed upon the ground that the question of jurisdiction had been entered into at the trial on March 21st, and decided in favour of jurisdiction; and on the further ground that the defendant, after the question of jurisdiction was thus disposed of, had applied for a new trial and had acted upon the order made by paying money into Court, and so had waived his objection to the jurisdiction.

Upon May 15th, 1893, the defendant applied before Meredith, J., in Chambers, for a prohibition, upon the grounds that the cause of action did not arise within the territorial limits of the first Division Court of the county of York, nor did the defendant reside or carry on business at the time the action was brought within the city limits, nor was the place of sittings of that Court the nearest to the defendant's residence.

G. H. Kilmer, was heard in support of the motion.

L. V. McBrady, contra, not called on.

The learned Judge said that—assuming that sec. 86 of the Act was not applicable to the case—the question of jurisdiction to try it depended upon the question of fact whether the note was made at Toronto, where it purported to have been—whether the whole cause of action arose in

Toronto—or not. That was a disputed question of fact Statement.
which the Division Court Judge was bound to fairly try, and to determine in the plaintiff's favour, before entering upon the trial of the case on its merits. It was not right to assume that he would not do so. If he should so determine it, his finding would not be reviewed on the motion for prohibition: *In re Long Point Company v. Anderson*, 18 A. R. 401. And it would be but a day or two before the suit would again come before him, with this intimation of his duty for his guidance if necessary.

That the case was not one in which it was, or could be, contended that there was no jurisdiction in any Division Court. The question, under the salutary amendments to the Division Courts Act, was now substantially one of venue. To prevent the expensive applications for prohibition so frequently made, under the stringent ruling of the Court of this Province, in such cases as *Noxon v. Holmes*, 24 C. P. 541, in regard to the meaning of the words "the cause of action"—to remedy that unsatisfactory state of affairs—the amendments were made, giving the Judge of the Court where suit brought, a limited jurisdiction in all cases, that is, a jurisdiction to transfer the case to the proper Court, a jurisdiction which may be exercised by him at the trial: *Re Thompson v. Hay*, 20 A. R. 379, 387.

He considered, therefore, that the motion was, at least, premature; that in any view of the question of fact the Division Court Judge had some jurisdiction in the case and could not be absolutely prohibited; that if he refused, at the approaching Sittings, to hear and determine the question of jurisdiction, he could be compelled by mandamus to do so; if he proceeded to try and determine the case in the face of proof that the cause of action was not one within his jurisdiction, then prohibition could go. There was no need yet for interference by this Court; that it was to be assumed that right would now be done in the Division Court.

He, therefore, gave the applicant the option of an

Statement. enlargement of the motion for one week, so that it might be disposed of after the suit had again come on for trial in the Division Court and been there dealt with, or a dismissal of the motion.

Kilmer chose the latter, and thereupon the motion was dismissed with costs.

The present motion was thereupon made before the Divisional Court by way of appeal, setting out the same grounds, and was argued upon June 9th, 1893, before BOYD, C., and FERGUSON, J.

G. H. Kilmer, for the defendant. There was no jurisdiction in the first Division Court of the county of York. The claim does not come within section 86 of the Division Court Act, R. S. O. ch. 51, for it was the interest alone which brought the claim over \$100, and that was not payable except as damages: *Nerlich v. Clifford*, 6 P. R. 212; *Watt v. Van Every*, 23 U. C. R. 196; *Noxon v. Holmes*, 24 C. P. 541. There was power to transfer: *Re Thompson v. Hay*, 22 O. R. 583. As to the application for a new trial: *Robertson v. Cornwell*, 7 P. R. 297; *Archibald v. Bushey*, 7 P. R. 304.

L. V. McBrady, for the plaintiff. Section 117 of the Division Court Act, R. S. O. ch. 51, shewed the right to give judgment in the absence of the defendant. As regards section 86, the plaintiff's claim comes within that section: *Re McCallum v. Gracey*, 10 P. R. 514. In *Archibald v. Bushey*, 7 P. R. at p. 306, Hagarty, C. J., refers to *Mayor of London v. Cox*, L. R. 2 H. L. 239, as to the interference of the Court being discretionary in such a case as this.

Kilmer, in reply. Interest is only recoverable in damages: *Powell v. Peck*, 15 A. R. 138; *St. John v. Rykert*, 10 S. C. R. 278, 288; *The Peoples Loan and Deposit Co. v. Grant*, 18 S. C. R. 262; *Sinclair's Division Court Acts*, at p. 54, note.

McBrady, in reply, referred to *Friendly v. Needler*, 10 P. R. 267.

September 9th, 1893. BOYD, C. :—

Judgment.

Boyd, C.

The right to prohibition appears to exist in this case, and if so (not being waived), the application should have been entertained favourably by the Judge in Chambers. It is laid down by the Court in *Olmstead v. Errington*, 11 P. R. at p. 369, that the defendant sued in a wrong Division Court, and having filed a notice disputing the jurisdiction, is entitled to apply to the High Court to prohibit the plaintiff from further proceeding in that Division Court against him on making it appear by affidavit that the plaintiff was wrong in his so proceeding. *The right existing*, it is optional with the defendant to apply at the outset of the Division Court proceedings, or he may wait till the latest stage and apply so long as there is anything to prohibit. It is not the course of the Court above to remit the matter to the Division Court judge for decision in cases where the facts shewing want of jurisdiction are undisputed or indisputable.

Here it is proved and not disputed that the instrument sued on was made in Wiarton, though dated at Toronto, and if so, the action cannot be maintained in the Toronto Court, because the whole cause of action did not arise there: *King v Farrell*, 8 P. R. 119. The defendant disputed the jurisdiction all along, and his having applied for and obtained a new trial on terms of paying the money into Court, does not bar his application to this Court for redress: *In re Evans v. Sutton*, 8 P. R. 367; *Robertson v. Cornwell*, 7 P. R. 297.

The principle on which costs are given in prohibition, are discussed by the full Court in *Re McLeod v. Emigh*, 12 P. R. 503, and no good cause is shewn here to deprive the applicant of the costs of the application and appeal. He has throughout raised the question of want of jurisdiction, but has never been allowed time to put in evidence the facts which now appear not to be contested as to the cause of action. The note sued on is an old one, and the defen-

Judgment. dant swears it has been paid. This indicates that there is
Boyd, C. a serious question to be tried on the merits.

This application turns upon the course to be pursued when there is no dispute about the facts shewing want of jurisdiction. By dispute, I mean a conflict of facts raised upon opposing affidavits, and not the mere assertion of the counsel or solicitor that the facts as to jurisdiction are in dispute. But even that assertion was not made here. When the facts as to want of jurisdiction are in dispute, then it would be proper to relegate the whole to the Division Court Judge, as was proposed to be done in the present case by the judgment now in appeal.

FERGUSON, J. :—

Appeal from the order of Mr. Justice Meredith, dismissing the application for a prohibition to the first Division Court of the county of York.

The action is upon a promissory note for the sum of \$99, which states on its face that it was made in Toronto. It is not made payable with interest, so that, although the claim is now for \$123 (many years' interest being claimed), there is not a contract to pay any more than the \$99, and it had to be conceded that the case does not fall under the provisions of section 86 of the Act respecting Division Courts, R. S. O. ch. 51.

It was proved and not disputed before us, that the note sued on, was in fact, made at Wiarton and not in Toronto, although by it the money was made payable in Toronto.

The whole cause of action did not arise in Toronto. The contract or promise was made at Wiarton. The breach took place in Toronto. But it requires both contract and breach to make up the whole cause of action: *King v. Farrell*, 8 P. R. 119.

The defendant in the suit in the Division Court, resides at Wiarton. The case falls under the 81st section of the Act, and the suit should have been brought in the Court holden in the Division in which the defendant resides, and

not in the Court holden in Toronto. It appears that the defendant continually from the beginning disputed and objected to the jurisdiction of the Court in Toronto, and although he did move for a new trial in that Court, he did so, as I think, of necessity, and looking at the reasoning of Mr. Justice Gwynne in *Robertson v. Cornwell*, 7 P. R. 297, and that of the late Sir Matthew Cameron, then Mr. Justice Cameron, in the case *In re Evans v. Sutton*, 8 P. R. at p. 371, the fair conclusion is that in the circumstances in which the defendant was, he did not by so doing, waive his right to object to the jurisdiction, or to apply for a writ of prohibition. These same cases, and the case *Re McLeod v. Emigh*, 12 P. R. at p. 454, seem to indicate that there is here full power to award or withhold costs.

I am of the opinion that this appeal should be allowed, and that an order for prohibition should go with costs of the application and of this appeal.

A. H. F. L.

[CHANCERY DIVISION.]

IN RE THE ONTARIO EXPRESS AND TRANSPORTATION
COMPANY.*Company—Increase of Capital Stock—Winding-up—Contributories—
Surrender of Shares.*

The charter of the company provided that the capital stock might be increased, if and when the original stock had been paid in full. When twenty per cent. had been paid on the latter a by-law allowing a discount of eighty per cent. was passed, and then another by-law increasing the capital stock. By subsequent Act, 54-55 Vict., ch. 110 (D.), the "reorganization" of the company was recited, and the company "as now organized," was declared capable of doing business:—

Held, in winding-up proceedings, that though the issue of the increased stock was irregular and illegal, yet the Act last referred to had validated it, and the holders of the new stock were liable as contributories.

Section 4, of the said Act, provided that any shareholder might surrender his shares within a time limited, and that the said shares should be forfeited, and his liability in respect thereof should cease:—

Held, in winding-up proceedings, that those who had thus surrendered their shares were not liable as contributories even to the extent of the ten per cent. which they ought to have paid at the time of subscription, but had not.

Statement.

THESE were a number of appeals from the report of the Master in Ordinary, dated June 13th, 1893, by persons thereby placed upon the list of contributories to the above company which was in process of winding-up under R. S. C. c. 129, and the amending Act, 52 Vict. c. 32 (D.)

As the same points were involved in the appeals, it was arranged that they should be argued together, and counsel representing certain of the contributories appealing were selected by arrangement with those representing the others to argue on behalf of all.

The cases involved the liability of the appellants as subscribers for stock in the company under a new issue, whereby the capital of the company as originally organized was attempted to be increased under circumstances stated in the judgment, and the points involved were thus taken in several of the notices of appeal:—

1. That the by-law for the increase of the capital stock of the said company was void, and the issue of any shares or stock over and above the 1,000 shares of \$100 each

authorized by 41 Vict. cap. 43 (D.), was *ultra vires* of the **Statement.** said company and illegal, and the alleged shares in respect of which the said — is made liable, being part of the new issues, were and are an absolute nullity giving the said — no rights and imposing upon him no liabilities.

2. The learned Master erred in holding that the alleged resolution of the 30th of January, 1891, purporting to allow a discount of eighty per cent. on the original stock of the said company had the effect of making the said discount a payment in full of the balance unpaid on the shares of the said original stock.

3. That the said by-law being bad and the subscription consequently being of no effect, the new Act (54-55 Vict. c. 110) did not confirm the said by-law or confirm or make binding the alleged subscription by the said —.

And as to the appellant, Wadsworth, specially referred to in the judgment, the additional ground was taken :

4. That the said H. W. Wadsworth not being a member or shareholder of the said company at the time of the making of the winding-up order the Master had no jurisdiction in the premises. That the said H. W. Wadsworth was not a contributory within the meaning of the Act, and that he was fully released by the 4th section of chapter 110 of 54-55 Vict. (D.), and, at all events, was only an ordinary debtor of the company.

The appeals were argued on October 19th, 1893, before BOYD, C.

A. *Hoskin*, Q. C., for the appellants. By section 16 of the incorporating Act, 41 Vict. c. 43 (D.), the whole amount shall be subscribed and twenty per cent. paid in cash, prior to June 1st, 1879, and if not, the charter is to cease. We say compliance with section 16 was a condition precedent. There was no payment except "by discount" as entered in the books—payment declared by resolution—that is all. The question is whether the by-law is invalid on account of eighty per cent. not having been paid, and

Argument. whether 54-55 Vict. c. 110 (D.) precludes the point, by ratifying the by-law. There were other informalities in the passing of the by-law. No action was taken by these appellants after subscription, and they did not pay anything. When a call was made they repudiated. The conclusion should not be drawn from the preamble of 54-55 Vict. c. 110 (D.), that the proceedings were sanctioned. The company was defunct. They came to the legislature to revive their charter. The word "organization" means the election of directors and appointment of officers: *New Haven, etc., R. W. Co. v. Chapman*, 38 Conn. at p. 66. See *Re Standard Fire Ins. Co.*, 12 A. R. 486, per BURTON, J.A., at p. 491; Spedding, on Private Corporations, at p. 308. The appellants should not be held bound by ambiguous language where their subscription was void at the time it was made: *Page v. Austin*, 10 S. C. R. at p. 171.

As to costs, I refer to *Fearnside and Dean's Case*, L. R. 1 Ch. 231, 243.

J. M. Clark, on the same side. Section 21 of the Act of 1878, 41 Vict. c. 43 (D.) has not been complied with. Under the charter of this company there is no authority to issue shares at a discount: 41 Vict. c. 43 (D.) s. 22; 32-33 Vict. c. 12 (C.) ss. 18, 44; R. S. C. c. 118, s. 18; *ib.* c. 129, s. 44; *Ooregum Gold Mining Co. of India v. Roper*, [1892] A. C. 125, which has been followed in *In re Railway Times Publishing Company*, 33 L. J. Ch. D. 370. In two previous cases, namely, *Plaskynaston Tube Company*, 23 Ch. D. 542, and *In re Ince Hall Rolling Mills Co.*, 23 Ch. D. 545, *n.* Chitty, J., decided that where a contract was duly registered, shares might be issued in pursuance thereof at a discount. He was overruled on appeal in *In re Almada and Tirito Co.*, 38 Ch. D. 415. This was a decision of the Court of Appeal which in the *Ooregum Gold Mining Case*, [1892] A. C. 125, was affirmed by the House of Lords. The issue at a discount is also contrary to the doctrine of *Trevor v. Whitworth*, 12 App. Cas. 409. The same principle is recognized in our own Courts:

Argument.

Page v. Austin, 10 S. C. R. 132 ; *Scales v. Irwin*, 34 U. C. R. 545. See also Buckley on Joint Stock Companies, 6th ed., p. 560 ; *In re London Celluloid Co.*, 39 Ch. D. 190. We submit that the issue of the new stock being contrary to the Act of 1878, 41 Vict. c. 43 (D.), incorporating the company, was illegal and void : *Page v. Austin*, 10 S. C. R. 132, see per Strong, J., at pp. 169, 171 ; *Bank of Hindustan, China and Japan v. Alison*, L. R. 6 C. P. 54 ; *Smith's Case*, L. R. 4 Ch. 611 ; *In re Financial Corporation*, L. R. 2 Ch. 714, at p. 735 ; *Sewell's Case*, L. R. 3 Ch. 131, p. 139 ; *Alabaster's Case*, L. R. 7 Eq. 273 ; *In re Central Bank of Canada*, *Baines' Case*, 16 A. R. 237, 240 ; *Re Standard Fire Insurance Company*, *Kelly's Case*, 12 A. R. 486 ; Morawetz on Private Corporations, 2nd ed. sec. 849 ; *Scovill v. Thayer*, 105 U. S. 143. The issue of stock and the subscriptions therefor being void, it is immaterial that no steps were taken prior to the winding-up to cancel the subscriptions : Healey on the Law of Joint Stock Companies, 2nd ed., at p. 50. See also *ib.* at pp. 284-5, as to the distinction between void and voidable transactions. The issue here and the subscription and everything founded thereon was void and not voidable. *Bank of Hindustan, China and Japan v. Alison*, L. R. 6 C. P. 54, shews that the subscribers to the new issue are not estopped, but may repudiate after a winding-up order is made : *Smith's Case*, L. R. 4 Ch. 611 ; *Stace & Worth's Case*, L. R. 4 Ch. 682 ; *Delano's Case*, 15 O. R. 75 ; *Re Central Bank*, *Baines' Case*, 16 O. R. 293 ; Lindley on the Law of Partnership, 4th ed., p. 1349 ; Lindley on the Law of Companies, 5th ed., p. 759-768 and 774. The issue of the new stock is not validated by the Act of 1891, 54-55 Vict. c. 110. In regard to the cases of Woods and Wadsworth, we submit that they having surrendered under the Act of 1891, 54-55 Vict. c. 110, ceased to be shareholders, and all liability in respect of their shares, which were forfeited, ceased : *Stocken's Case*, L. R. 3 Ch. 412, especially per Lord Cairns, L. J., at p. 415 ; *Ex parte Littledale*, L. R. 9 Ch. 257, at pp. 259, 262. Even if there were any liability in respect of

Argument. the first call, there is no provision in our Winding-up Act for enforcing such liability, and if any such liability exists, it must be enforced by action in the ordinary way.

Hoyles, Q.C., for the liquidator. Even if the original issue of increased stock was void, everything has been cured by 54-55 Vict. c. 110, which is a curative or remedial Act. Every Act shall be deemed remedial: R. S. C. c. 1, s. 7, sub-s. 56. See also *ib.* sub-s. 54. The "reorganization" was the issue of the new stock. We find there was new stock and new corporators. These shares are not void, in any event. If they can legally exist, no matter how improper, subscribers are estopped: Lindley on the Law of Companies, 5th ed., p. 52; Beach on Private Corporations, vol. 1, p. 265; *In re Miller's Dale, etc., Lime Co.*, 31 Ch. D. 211; Healey on the Law of Joint Stock Companies, 2nd ed., pp. 167, 365; *Veeder v. Mudgett*, 95 N. Y. 295, 311; *Re Bank of Hindustan, Alison's Case*, L. R. 9 Ch. at p. 19; *Hare's Case*, L. R. 4 Ch. 503, at p. 509; *Challis' Case*, L. R. 6 Ch. 266, at p. 271; *Oakes v. Turquand*, L. R. 2 H. L. at pp. 348, 352, 369; Spelling on Private Corporations, vol. 2, ss. 804, 828; *Chubb v. Upton*, 95 U. S. 665. All these cases proceed on the ground that where there is power to issue stock, but certain formalities are to be gone through; creditors are not to be prejudiced by the fact that they have not been gone through. The *Ooregum Gold Mining Company Case* and others cited on the other side, are cases of companies proceeding against shareholders. Here the shareholders are seeking to be relieved as against creditors. *Page v. Austin*, was a case where the strictest legal liability was enforced: see 7 A. R. at pp. 7-8, per Burton, J.A.: *Re the Standard Fire Ins. Co.*, 12 A. R. at p. 487, per Burton, J. A. As to discount, section 12 of the Act looks at an allotting of shares at a discount. In such cases as *In re Plaskynaston*, 23 Ch. D. 542, cited on the other side, there was no such statutory authority. I refer, also, to *In re Accidental and Marine Insurance Corporation*, L. R. 4 Ch. 267; *In re Blakely Ordnance Company*, L. R. 5 Ch. 63. As to

the liability of Woods and Wadsworth, see *Gathercole v. Smith*, 17 Ch. D. at pp. 7, 9; Brice on *Ultra Vires*, 3rd ed., p. 325; R. S. C. c. 119, s. 41.

Hoskin, in reply. It is not a matter of formality as to the compliance with section 21 of 41 Vict. c. 43 (D.). The capital stock is not the company. The president, directors and shareholders are the company.

October 21st, 1893. BOYD, C.:—

Apart from the provisions of the special statutes relating to the company, difficult questions of law would arise as to the liability of the appellants. In the winding-up proceedings, they as shareholders *de facto*, whose obligation is in terms to pay up the subscribed shares, have by no means so advantageous a position as if the rights of creditors had not intervened. This is emphasized in a very late decision, which explains the language of Lord Herschell in one of the cases cited to me. I refer to *In re Pioneers of Mashonaland Syndicate*, [1893] 1 Ch. at p. 734.

Apart from the statutes, the question to be discussed would be whether the increase of capital stock was void or merely voidable, *i. e.*, whether it was *ultra vires* absolutely or relatively. As expressed in the last edition of Lindley on Companies, p. 52: "If the shares can in any circumstances legally exist, then, however improper their issue may have been, the company and the holder of them may be estopped from denying their existence and the holding of them by him; but if they cannot legally exist, the person taking them cannot by estoppel or otherwise become a member in respect of them."

Page v. Austin, 10 S. C. R. 132, decides that when the power is to increase capital stock at any time after the whole original capital stock of the company had been allotted and paid in but not sooner, it is a condition precedent indispensable to the validity of the increase, that all the original stock should be paid in full. The absence

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of this element utterly avoids the issue, so that legally there was never any increased capital.

On the other hand, when the capital was increased by resolution, which was so irregularly passed that the objection would have been fatal as between the company and the shareholders, yet the statutory defect did not operate against the creditors in liquidation: *In re Miller's Dale, etc., Lime Co.*, 31 Ch. D. 211.

The same distinction is marked in two American decisions of the highest value: *Chubb v. Upton*, 95 U. S. 665, where there had been an attempt to create increased capital stock in regard to which the provisions of the statutes had not been observed; and *Scovell v. Thayer*, 105 U. S. 143, where stock issued in excess of the limit imposed by the charter, was held void to all intents. The Court distinguishes the cases where the increase of the stock was authorized by law and within the power of the corporation, but informalities had existed in the steps taken to affect the increase.

In the present case the statute forming the charter of the company, permitted the capital stock to be increased on certain conditions—one of which was that it should not be lawful so to do until the capital stock (original) had been paid in full [41 Vict. ch. 43, sec. 21 (D.)]. A by-law was passed by which it was declared that the holders of the original stock should be allowed a discount of eighty per cent. thereon, which was confirmed by the shareholders. This, with the twenty per cent. paid on the original stock, was treated as a payment in full, whereupon was based the by-law to increase the capital stock.

If the point were, after *Page v. Austin*, open for consideration, I should prefer to hold that this is a case in which the shareholders are liable in the winding-up, upon the increased stock. The distinction, as I conceive, is well put in the language of Finch, J., in *Veeder v. Mudgett*, 95 N. Y., at p. 310, between cases where there is under the law an entire lack of power to do the act brought in question, and those in which the abstract power does exist, and

in which the act could be lawfully done. There was here the power to increase; it could be lawfully effected, and as against those who take the stock as subscribers (knowing personally all the history of the increase), I think the creditors in the liquidation would have the right to treat such stock as valid existent assets of the company.

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But the statute passed after the increase of capital stock must be taken into consideration.

The company originally was permitted to begin operations when the whole capital stock was subscribed, and twenty per cent. paid thereon: section 16 of the Act of 1878, 41 Vict. ch. 43 (D.). That is to be regarded as the date when the company was "organized." Such is the use of the word in the preamble of the next and last statute 54-55 Vict. ch. 110, "Whereas the company was duly organized, the whole of the capital stock thereof being subscribed and twenty per cent. thereof paid thereon," etc. Then it is recited, whereas the said company carried on its business for several years before it ceased its operations; and whereas the company has been reorganized and desires to continue to carry on business on the terms and conditions in the said Act specified."

The effect of the term "reorganized," was discussed. This word was noticed by Chitty, J., in *Hooper v. Western*, 41 W. R. 84, as a less familiar word than "reconstruct," but neither being words of art or having a technical meaning in law. The word, however, is of very frequent use in American company law, and appears not infrequently in Canadian statutes.

The word "organization" is used in R. S. C. ch. 119, sec. 99, to cover the whole details of the corporation as an operative body. Many sections in *Spelling on Private Corporations*, are devoted to the subject "Reorganization." See Index, p. 1357, *sub voce*.

Now the only fact in the history of this company which it is pertinent to speak of as a "reorganization," is the transaction in hand as to the irregular or illegal issue of increased capital stock.

Judgment.

Boyd, C.

The company was originally constituted with one thousand shares of capital stock; this is increased tenfold in disregard of the directions of the statute of 1878. These new *de facto* shareholders are to be made constituents of the corporate body which is done by legislative recognition of the company in its thus reorganized condition,—the same and yet not the same. It is pointed out by Spelling that every change in the capital stock, is in one sense the creation of a new corporation: Law of Private Corporations, vol. 1, sec. 284.

The effect of the Act is to validate the new corporation—made up of the subscribers for the new issue of increased capital stock—to make these constituents of the new concern as reorganized, and it declares the company “as now organized,” to be capable of doing business: section 1. Then as the statute was the outcome of a contest between the new and old shareholders, section 4 enables any person then holding shares, to surrender within a future period if disposed to withdraw from the new company.*

I cannot suppose that the Parliament did not know the condition of affairs which distinguished the company as then reorganized from its original organization. The Act was passed with a view of validating what had been done, saving of course, the rights of creditors of the company “whether as originally organized or as reorganized,” section 2. It appears to me that the company itself and the shareholders holding the new increased capital stock who participated in the passing of the Act or who took the benefit of the Act by retaining their stock (when they might have surrendered it), can not be heard to impeach the curative provisions of this legislation:

*54-55 Vict. ch. 110, sec. 4, is as follows:

Notwithstanding anything in this Act, no persons now owning or holding any share in the capital stock of the company, shall be liable to pay any call or calls hereafter made on such share, if, within one month after notice to him of the first call made subsequent to the passing of this Act, he gives written notice to the company that he surrenders his shares. Whereupon such shares shall be forfeited to the company, and his liability in respect thereof shall cease.

Challis' Case, L. R. 6 Ch. 266. See also *The Crawford and High Peak R. W. Co. v. Lacey*, 3 Y. & J. 80.

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Boyd, C.

The judgment of the Master should be affirmed on this head with costs.

As to Woods and Wadsworth's Cases, they stand on a different footing. These subscribers to the new stock took advantage of the 4th section of the Act of 1891, and made surrender of their shares. By the terms of their subscription ten per cent. was to be then paid. This was not paid, and the Master has charged them to this extent as contributories. The statute provides that the effect of the surrender is to forfeit the shares so that liability thereon shall cease. The statute implies that the reorganized company is to carry on business on the terms and conditions in the first Act specified. That statute 41 Vict. ch. 43, section 19, provides for cases of forfeiture, and it also incorporates the provisions of the Canada Joint Stock Companies Clauses Act, 32-33 Vict. ch. 12, which also has a section 20 as to forfeitures (now carried into R. S. C. ch. 118, sec. 20). But neither contains such a provision as appears in The Companies' Act, R. S. C., ch. 119, sec. 41, by which, even after forfeiture, the holder of the shares shall remain liable to the creditors for the full amount unpaid on such shares at the time of forfeiture. In the absence of such saving clause, I do not think the member was bound to make good defaults antecedently to the forfeiture. Such is the opinion expressed by Lord Cairns, L.J., in *Stocken's Case*, L. R. 3 Ch. at p. 415, on words analogous to those used in the present statute. He thinks, first, that all rights incident to the shares are extinguished, and in addition to that, secondly, that the mere fact of a forfeiture without anything in the articles defining the effect of forfeiture would, of itself, in the very nature of things, render any proceedings at law for past calls incompetent, because such proceedings assume that the person sued was a shareholder of the company, which he had ceased to be.

Past shareholders whose shares have been surrendered (under the statute) so as to work a forfeiture, do not ap-

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pear to fall within any of the terms of the Winding-up Act as to contributories: *In re Hoylake R. W. Co.*, L. R. 9 Ch. 257, 260, but this is not important if in truth nothing is collectable by force of law in respect of arrears at the date of forfeiture. But assume that there is liability for the first ten per cent. on the shares forfeited, it would be in the nature of a debt due irrespective of the Act validating the reorganization because the surrender excludes the shareholders from the operation of that Act. The case would then fall on the original liability of the new shareholders to be proceeded against for calls, and applying the doctrine of *Page v. Austin*, there could be no recovery even as against creditors because no estoppel arises to prevent the truth being disclosed that the new issue of increased capital was illegal and void to all intents.

These appeals should succeed with costs to be paid by the liquidators out of the assets.

The last appeal is as to *Nelson's Case*, and that should not be disturbed. He merely protested against being made liable on the ground of certain misrepresentations, but did not then move before the winding-up order was made. Mere attempted repudiation, unless followed by active steps to vacate the subscription avails not as against the liquidator representing the creditor through the company: *Marshall v. Glamorgan Iron and Coal Co.*, L. R. 7 Eq. 129, 137; *Oakes v. Turquand*, L. R. 2 H. L. 325.

This appeal should be dismissed with costs.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

CITY OF TORONTO V. LORSCH.

*Municipal Corporations—Public Highway—Obstruction by Private Person
—Declaratory Judgment—Injunction.*

A municipal corporation has the right to have it declared, as against a private person, whether or not certain land is a public highway, and whether such person has the right to possess, occupy, and obstruct the same.

And in an action brought by the municipal corporation for the purpose, a declaration may be made according to the facts, and the defendant enjoined from possessing or occupying the land so as to obstruct the use of it as a public highway.

Fenelon Falls v. Victoria R. W. Co., 29 Gr. 4, followed.

Gooderham v. City of Toronto, 21 O. R. 120 ; 19 A. R. 641, applied and followed.

DEMURRER by the defendant to the statement of claim Statement.
in an action by the corporation of the city of Toronto
against David Gilbert Lorsch.

The statement of claim alleged :

(1) That the plaintiffs were a municipal corporation incorporated under the laws of Ontario, and the defendant was a resident of the city of Toronto.

(2) That Queen street west in the city of Toronto was one of the public highways of the city.

(3) That the defendant had taken possession of and was occupying part of that street without any colour of right, and was by such possession and occupation obstructing the highway.

(4) That the part of the street occupied by the defendant was described as follows, etc. :

And the plaintiffs claimed :

(1) That it might be declared that the lands described were part of Queen street west, one of the public highways in the city of Toronto, and that the defendant was not entitled to occupy or obstruct the same, and that the defendant might be ordered to go out of possession and occupation of the said lands, and to remove all obstructions therefrom.

Statement. (2) Such further and other relief as the nature of the case might require.

(3) Costs of the action.

The defendant demurred on the grounds :

(1) That the plaintiffs were nowhere alleged or shewn in the statement of claim to have any such title or interest in the lands in question as would enable them to maintain this action either for the declaration prayed for or for the possessory remedy sought.

(2) That as to the claim for possession, the plaintiffs had no such exclusive right to possession of the alleged highway as was necessary to enable them to maintain such claim.

(3) That as to the claim for a declaration or declaratory judgment, the pronouncing or refusing to pronounce such a declaration or judgment could not be a final or binding adjudication upon the matters submitted by the statement of claim, the Crown being a necessary party to such final or binding adjudication, by reason (a) of the title to the lands in question being vested in the Crown, and (b) of the interest of the public in the matters submitted by the statement of claim.

The demurrer was argued before ROSE, J., in Court, on the 6th October, 1893.

Shepley, Q. C., for the defendant. The plaintiffs cannot maintain ejectment for the highway: *Town of Sarnia v. Great Western R. W. Co.*, 21 U. C. R. 59. *Wellington v. Wilson*, 14 C. P. 299 ; 16 C. P. 124, was a case of injury to a bridge ; and *Burleigh v. Hales*, 27 U. C. R. 72, and *Barrie v. Gillies*, 21 C. P. 213, cases of trespass for cutting trees growing on the highway. No action will lie by an individual for obstructing a road without allegation of special damage: *Fisher v. Vaughan*, 12 U. C. R. 55 ; *Jarvis v. Great Western R. W. Co.*, 8 C. P. 115 ; *Township of Sarnia v. Great Western R. W. Co.*, 17 U. C. R. 65 ; *Baird v. Wilson*, 22 C. P. 491 ; *Magee v. London and Port Stanley R. W. Co.*, 6 Gr. 170. As to whether the

plaintiffs can maintain an action for a declaration and injunction, I refer to *McKillop v. Smith*, 24 Gr. 278; *St. Vincent v. Greenfield*, 15 A. R. at p. 568; *Fenelon Falls v. Victoria R. W. Co.*, 29 Gr. 4; *Guelph v. Canada Co.*, 4 Gr. 632; *Saugeen v. Church Society*, 6 Gr. 538. Argument.

Biggar, Q. C., for the plaintiffs. By section 525 of the Consolidated Municipal Act, 55 Vic. ch. 42, the soil and freehold of highways are vested in the Crown, and by section 527 the jurisdiction is vested in the municipality. Ejectment will determine whether the title is in the municipality or the individual. I refer to *Wandsworth Board of Works v. United Telephone Co.*, 13 Q. B. D. 904; *Coverdale v. Charlton*, 4 Q. B. D. 104; *St. Vincent v. Greenfield*, 15 A. R. 567.

November 9, 1893. ROSE, J.:—

Fenelon Falls v. Victoria R. W. Co., 29 Gr. 4, is a clear authority in the plaintiff's favour, and I see no reason for not following it. The proceeding is a convenient mode for determining the question of highway or no highway.

In *Gooderham v. Toronto*, 21 O. R. 120, and 19 A. R. 641, the right of a private person to have a declaration as to whether certain land was or was not a public highway, as against a municipal corporation was affirmed.

I see no reason why a municipal corporation should not have a similar right to have it determined as against a private person whether or not certain land was a public highway, and whether such person had the right to possess, occupy, and obstruct the same.

By the demurrer it is admitted that the land in question is a public highway, and that the defendant is in possession and occupation thereof, and obstructing the same.

Such being admitted, I see no reason why a declaration according to the facts should not be made, and the relief asked for granted, viz., enjoining the defendant from further possessing and occupying the same so as to obstruct the

Judgment. use thereof as a public highway. See Dillon on Municipal
Rose, J. Corporations, 4th ed., p. 788, sec. 662.

The demurrer must be overruled with costs in the cause to the plaintiff in any event, with liberty to the defendant to plead to the facts as he may be advised.

[QUEEN'S BENCH DIVISION.]

ST. DENIS v. HIGGINS.

Specific Performance—Contract for Exchange of Lands—Title not in Plaintiff—Knowledge of Defendant.

Where the plaintiff, at the time he entered into a contract with the defendant for the exchange of lands, had no title to the lands he proposed to exchange, which were, to the knowledge of the defendant at the time of the contract, vested in the plaintiff's wife:—

Held, in an action for specific performance, that the defendant could not withdraw on the ground that the plaintiff had no title, at any rate before the time fixed for the completion of the exchange; and the plaintiff, having tendered a conveyance from his wife before action, was entitled to succeed; for the defendant, having entered into the contract knowing that it did not bind the estate, but only the person, of the plaintiff, must be taken to have relied from the beginning upon the promise of the plaintiff to procure the concurrence of the owner, and could not set up that the plaintiff was not the owner.

Dictum of KEKEWICH, J., in *Wylson v. Dunn*, 34 Ch. D. 569, not followed.

Statement. THIS was an action to compel specific performance of an agreement for the exchange of certain properties, and was tried before ARMOUR, C. J., at the Toronto Spring Assizes, without a jury, on 22nd March, 1893. The defence set up, so far as it is now material, was that the defendant after the signing of the contract proceeded to investigate the title in the registry office, and found no title either in the plaintiff or his wife; that thereupon on 29th June, 1892, he repudiated the agreement; and that the plaintiff had never made any reply to this repudiation, nor disclosed any title in himself or his wife, nor had he asked for the performance of the agreement except by this action.

The agreement between the parties to the action was under their respective hands and seals. It was in the form of an offer by the defendant accepted by the plaintiff, both instruments being dated 24th June, 1892. Statement.

The defendant offered to exchange a certain hotel property belonging to him for certain lands in the township of Pickering containing 425 acres, "and standing in the name of Louis St. Denis, or of his wife," subject to certain mortgages, "neither of us to furnish or produce any abstract of title, deeds, copies of evidence of title not in our possession; each of us to search the title at our own expense; exchange to be completed on or before the 5th day of July."

"* * I do hereby attest that I am the sole owner of the first above mentioned property."

The acceptance was written below the offer, and concluded with the words, "I do hereby attest that I am the sole owner of the last above mentioned property."

(Signed) "LOUIS J. ST. DENIS" (Seal).

On 29th June, 1892, the defendant's solicitor wrote to the plaintiff's solicitors, repudiating the agreement and stating that the defendant declined to be bound by it, on the ground (amongst others) that the registry office disclosed no title in the plaintiff or his wife, that rights of way existed over it, and that the mortgages on it bore a higher rate of interest than the defendant had agreed to assume. No reply was made to this letter, but shortly before action the plaintiff's solicitors tendered to the defendant's solicitors a conveyance unregistered from James Hurlburt to Aurelia St. Denis, the wife of the plaintiff, and a conveyance from Aurelia St. Denis to the defendant, and required the defendant to carry out the exchange. The defendant's solicitors declined to do so, and relied upon their repudiation of the contract as having terminated it.

This action was brought on 2nd August, 1892. The plaintiff was examined as a witness at the trial. He stated that he was not then and never had been the owner of the land in Pickering, mentioned in the contract; that his wife Aurelia St. Denis (who was not a party to the action)

Statement. was the owner, and was entitled to any benefit arising from the present action ; that he had no power of attorney from her ; that he told the defendant's solicitor at the time the contract was made that the land belonged to his wife and not to himself ; and that the defendant knew that fact ; that at the time of the trial of the action the title to the land appeared in the registry office in the name of James Hurlburt, subject to certain mortgages ; but that he, the plaintiff, had always been ready and willing and able to procure the necessary conveyances to vest it in the defendant.

The learned Chief Justice made the usual judgment for specific performance, with a reference as to title, and reserved the costs.

At the Easter Sittings of the Divisional Court, 1893, the defendant moved to set this judgment aside, upon the ground that it was contrary to law and the evidence, and to enter judgment for the defendant.

The motion was argued on 25th May, 1893, before the Divisional Court (FALCONBRIDGE and STREET, JJ.)

Waldron, for the defendant, relied on *Robinson v. Harris*, 21 S. C. R. 390 ; *Paisley v. Wills*, 19 O. R. 303, 18 A. R. 210 ; *McIntosh v. Rogers*, 14 O. R. 97 ; *Re Boustead and Warwick*, 12 O. R. 488 ; *Wylson v. Dunn*, 34 Ch. D. 569.

G. H. Stephenson, for the plaintiff, contra.

December 7, 1893. The judgment of the Court was delivered by

STREET, J. :—

The plaintiff, at the time he entered into the contract in question, had no title to the lands which he proposed to exchange. Those lands were in fact at that time vested not in the plaintiff, but in his wife, and they have always

so remained, the plaintiff having no interest whatever in them. I think it must be taken to have been proved that, at the time of the contract, the defendant and his solicitor knew the lands were vested in the wife, and not in the plaintiff; and that, with that knowledge, the defendant entered into the contract in question. According to the opinion of Kekewich, J., in *Wylson v. Dunn*, 34 Ch. D. 569, the defendant, although having entered into this contract with the knowledge that the person with whom he had contracted was not the owner of the land, might have repudiated it at any time before the defect was cured, and the plaintiff's only remedy then would be to recover damages for the legal breach of the contract. That expression of opinion does not appear to have been necessary for the determination of the case in which it is reported, and it does not appear to be founded on authority. With great deference, I cannot think it is founded on principle, or that it is a dictum which should be followed. Why should a man who, with his eyes open, has entered into a contract with another to buy land from the other which he does not own, be allowed to say, before the time for completion has arrived, that he has changed his mind? He knew from the beginning that the land was not bound by the contract, and that he was getting only the personal liability of the other party. Here the plaintiff in effect said: "I am not the owner, but I will get you a title by the 5th July," and the contract was made on that basis. In my opinion, the defendant could not withdraw before the 5th July at all events, and their letter of repudiation of 29th June had no effect upon the contract. See judgment of Fry, L. J., in *Ellis v. Rogers*, 29 Ch. D. at p. 672.

Judgment.

Street, J.

This case is different from the other cases referred to, in the fact that at the time of the trial the plaintiff had no interest in the land; and had in effect simply agreed to sell his wife's land. He shewed at the hearing, however, that his wife was ready and willing to convey the land to the defendant, in pursuance of her husband's contract, and that a conveyance from her to the purchaser had been

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Street, J.

tendered before action. In my opinion, the governing fact in this and similar cases is that the other party has entered into the contract knowing that the contract did not bind the estate, but only the person, of the contracting party. He relies from the beginning upon the promise of the vendor to procure the concurrence of the owner, and he cannot set up that the vendor is not the owner: *Eyston v. Simonds*, 1 Y. & C. C. C. 608; *Salisbury v. Hatcher*, 2 Y. & C. C. C. 54; *Paisley v. Wills*, 18 A. R. 210; *Bellamy v. Debenham*, [1891] 1 Ch. 412; Dart on Vendor and Purchaser, 6th ed., pp. 1178-9.

The motion should, therefore, be dismissed with costs to the plaintiff in any event.

[CHANCERY DIVISION.]

KERFOOT V. THE MUNICIPAL CORPORATION OF THE
VILLAGE OF WATFORD.

Municipal Corporations—Construction of Drain—Ordinary Expenditure of Year—Submission of By-laws twice in one year—53 Vict. ch. 42, (O.)—Extra Territorial Limits.

The construction of a drain being necessary both from a sanitary point of view and for the purpose of keeping in repair the highway under which a portion of it passed, the defendants resolved to construct it if necessary as part of the ordinary expenditure of the current year, but nevertheless, submitted a by-law for its construction to the electors which was defeated. They, however, proceeded with its construction, and again a second time in the same year submitted the by-law to the vote, when it was carried. It appeared that the drain might have been paid for out of the ordinary expenditure of the year without exceeding the statutable limit of taxation :—

Held, that the first by-law having been defeated did not prevent the submission of the second in the same year, nor did the fact of the work having been commenced as an item of ordinary expenditure for the year, after the defeat of the by-law, incapacitate the defendants from again submitting a by-law for its construction :—

Held, also, that the defendants had power to pass the by-law notwithstanding that part of the work was to be done on land outside the territorial limits and without the consent of the adjacent municipality.

THIS was an action brought by Thomas Kerfoot on behalf of himself and all other the ratepayers of the corporation of the village of Watford against the municipal corporation of the village, for an injunction mandatory or otherwise restraining the defendants from acting under a certain by-law and constructing a certain drain thereunder or ordering them to close, fill up and remove the same, if they should have already constructed it, and also restraining them from imposing, levying or collecting the rates or moneys authorized by the by-law to be imposed, levied or collected. Statement.

The by-law was entitled: "A by-law to raise the sum of \$1146 by the issue of debentures, to maintain, improve and repair the sewer along Huron street from the easterly limit of Main street W., to the outlet."

It appeared that the defendants submitted the by-law to the vote of the electors in June, 1893, when there was a majority against it, but on August 22nd, 1893, the defen-

Statement. dants caused it to be again submitted to the vote and a majority was then polled in favour of it, and on August 30th, 1893, it was finally passed.

The facts in connection with the case are stated in the judgment of MEREDITH, J.

The action was tried at Sarnia on October 10th, 1893.

J. B. Clarke, Q. C., for the plaintiff. The council had the right to do one of two things, either pay for the work out of the current year's taxes, or provide for it by by-law which must be passed before the work is done. It is foreign to the policy of the Act to allow the work to be done first. The nature of the improvement was not warranted. The drain was a new one and an open one : *R. S. O. c. 184, s. 492 ; Corporation of the Township of Barton v. Corporation of the City of Hamilton*, 18 O. R. 199, 17 A. R. 346, 20 S. C. R. 173. Then it is illegal to go beyond the limits of the municipality. The by-law was pressed on the ratepayers under a threat of levying the whole amount in one year. As to the work done without any by-law a motion to quash would be useless. There was no by-law then : *Holt v. Corporation of the Township of Medonte*, 22 O. R. 302 ; *Rose v. Township of West Wawanosh*, 19 O. R. 294.

Lister, Q. C., and *Cowan* for the defendants. The action taken by the council was within 55 Vict. c. 42, (O.), s. 340. They had power to proceed whether the by-law was passed or not ; so that it made no difference whether it was submitted to the people before the work was done or not. There can be no injunction when the person complaining suffers nothing. *Corporation of the Township of Barton v. Corporation of the City of Hamilton* was an action by the municipality which was injured, not by a ratepayer of the defendants. The drain was not a new one in any sense. It was a natural watercourse, and there was the right to keep it in repair, and enter for that purpose. If the expenditure beyond the limits is bad, the rate can only be vitiated to that extent, which is in this case insignificant.

November 1st, 1893. MEREDITH, J.:—

Judgment.

Meredith, J.

When this case first came before me, on motion to continue an interim injunction granted by a local judge, I was unable to perceive the need of an action—why any relief the plaintiff might be entitled to, assuming him to be in the right, would not be sufficiently afforded by quashing the by-law; and after the trial, where the facts have been more fully disclosed, I am confirmed in that view.

It does not seem to be clearly settled where, and for what purposes, an action of this character will lie; or whether, or where, relief must be sought by way of summary motion to quash.

Before the union and consolidation of all the Superior Courts, by the Judicature Act, it was settled that the Court of Chancery had power to restrain the enforcement of a by-law of doubtful validity, until the applicant had opportunity to move in a Court of common law to quash it, but had no general jurisdiction to test the validity of it: *Vandecar v. The Corporation of East Oxford*, 3 A. R. 131; *Carroll v. Perth*, 10 Gr. 64; *The Edinburgh Life Assurance Co. v. The Municipality of the Town of St. Catharines*, *ib.* 379; *Grier v. St. Vincent*, 12 Gr. 330 and 13 Gr. 512, and *Wilkie v. The Corporation of the Village of Clinton*, 18 Gr. 557; see also, *Helm v. The Corporation of the Town of Port Hope et al.*, 22 Gr. 273; *Davies v. The Corporation of the City of Toronto*, 15 O. R. 33; and *Smith v. City of London*, 13 C. L. T. 90.

But, since such union and consolidation of the Courts, it is difficult to perceive why the whole relief should not be given in the action; why, in any case where an action is necessary, the question of the validity of the by-law should not be determined in it, and the by-law, if invalid, quashed; and why, if need be, the recognizance required by section 332, sub-section 3, of the Consolidated Municipal Act, 1892, 55 Vict. ch. 42, might not be given in the action. And it may be observed that the Act seems to recognize this view of the question, section 352 referring to an "application

Judgment. or action to quash or set aside" a registered by-law, and
Meredith, J. to the "action or proceeding" for such purpose.

Such cases as *Alexander v. The Corporation of the Township of Howard*, 14 O. R. 22, *Bannan v. The Corporation of the City of Toronto*, 22 O. R. 274, and *Holt v. The Corporation of the Township of Medonte et al*, *ib.* 302, seem to indicate that complete relief can be had in an action; but in none of the cases was the plaintiff suing in respect of his rights as a ratepayer, in common with all other ratepayers of the municipality, only, nor did the Court, in express terms, quash the by-law, though going as far, in some of the cases, as to declare it "illegal and invalid:" see also, *Connor v. Middagh*, 16 A. R. 356, and *Rose v. Township of West Wawanosh*, 19 O. R. 294.

In this case, although, in my opinion, it was not one in which relief by way of injunction should to any extent have been granted, the defendants have permitted the action to be brought down to trial, and to be tried, at great expense, without insisting upon this objection or asking for the security which the recognizance might have afforded them, and the whole of the facts and evidence are now before the Court, so that no good purpose would be gained by leaving it open to the parties to litigate again the question of the validity of the by-law by way of a summary motion to quash it. I therefore decline now to give effect to the objection, and proceed to consider the substantial matters in question between parties as fully as upon a motion to quash as well as in an action for an injunction.

As before intimated, the plaintiff sues in respect of his rights as a ratepayer of the municipality only, and on behalf of all other ratepayers, whose rights are identical with his.

The ground of his complaint is the alleged illegality of the action of the defendants' council, and the cost and loss it must, and may, cause him, and those in whose behalf he sues, as taxpayers; he does not, and cannot, claim in any other way, right, or interest.

Judgment.

Meredith, J.

The grounds of his claim for relief are :

1. That the by-law was not duly passed, by reason of an irregularity in the appointment of a person to attend the polling place, and at the final summing up of the vote, on behalf of the persons interested in opposing the passage of the by-law : see secs. 296 and 297 of the Act, 55 Vict. c. 42, (O.) :

2. That the by-law could not be lawfully submitted : (a) because the work was contracted for and begun before its submission to the electors; and (b) because a similar by-law had, in the same year, and shortly before, been so submitted, and was defeated :

3. That part of the work extended beyond the territorial limits of the municipality : and

4. That part of the work is an open drain, extending into an adjoining municipality, and was constructed without the consent of its council.

The facts, as I find them, are that the work is not a sewer, but is a drain, constructed in a natural watercourse, for the purpose of carrying off surface water in the same course that it has for many years gone : that the construction of a new drain was necessary from a sanitary point of view, as well as for the purpose of keeping in repair the highway under which the boxed in portion of it passed : that, in fact, the old box drain, by reason of faulty construction, age and decay, had become a nuisance : that the local health authorities urged and pressed the defendants' Council to remove it, and construct the new drain : and that the Council accordingly intended to do so whether or not either by-law carried, or was defeated, at the poll, and proceeded to do so, after the defeat of the first and before the submission of the second by-law, purposing to pay for the work, as ordinary expenditure for the current year, if the by-law were defeated, which they could have done without exceeding the statutable limit of taxation : that all of the work beyond the limits of the municipality cost but a very small portion of the whole cost of the drain—a comparatively trifling amount, and was completed, as was

Judgment. also a part of the open drain within such limits, before
Meredith, J. the commencement of this action: that William Cowan,
in the statement of claim referred to,* stood by when
the work on his land was being done, and did not object,
but rather consented, to it: and that the council of the
adjoining municipality neither objected nor consented
to it.

Then, making the strong assumption in the plaintiff's
favour, that, if he succeed upon any of these grounds, he
is entitled to relief, has he established any of them?

The first ground was not pressed at the close of the
trial, it being obvious that the result could not, by any
possibility, have been affected by the irregularity: indeed,
I find as a fact that it did not affect at all the number of
votes cast on either side, or the poll otherwise; and such
being the case, it is not a sufficient ground for quashing
the by-law; it cannot alone affect its validity.

The second is the main question, and the only one which
has caused me any difficulty.

Under section 357, the council is bound to assess and
levy a sum sufficient in each year to pay all the valid debts
of the corporation falling due within the year, but is not
at liberty to assess and levy a greater rate than two cents
in the dollar, exclusive of school rates: and, under section
344, every by-law (except for drainage under section 369 or

* The reference in the statement of claim was as follows:—

5. The drain, the construction of which is authorized by the said
by-law, commences in or near the centre of the said village of Watford,
and runs into the adjoining municipality of the township of Warwick for
more than half its length and passes through the land of William Cowan
and others in the said township, and passes within a distance of about
thirty rods from the front door of the said Cowan's dwelling house and
discharges into his farm, and during its whole length in the said town-
ship it is an open drain.

6. The defendants have not obtained the consent of the said munici-
pality of the township of Warwick to the construction of the said drain
nor have any terms as to the construction thereof been agreed upon
between the defendants and the municipality, and the said Cowan objects
to the construction of the same through his said land, and threatens and
intends to institute legal proceedings in consequence of the same against
the defendants.

for local assessments) for raising, on the credit of the municipality, any money, not required for its ordinary expenditure and not payable within the same year, is required to receive the assent of the electors, with some other exceptions. Judgment.
Meredith, J.

Although the first by-law was defeated, there seems to be nothing to prevent the submission of the second; so that that was, standing alone, a matter in the discretion of the council; all that the Act requires is the assent of the electors in the manner provided for in it.

But it was urged, that having commenced the work it was then too late to submit the second by-law, that the cost of it then came under the provisions of section 357: but, assuming it to be an "ordinary expenditure," there is nothing in the Act expressly prohibiting the passing of the by-law after the work is begun: and I am unable to perceive any sufficient reason for holding that the Council might not, as they did, say, this work must be done, we have the power and the intention to do it and pay for it during our term of office, unless the ratepayers prefer that the money be borrowed to pay for it, and repayment be made as the by-law provides, and that their preference would be given effect to.

There is no doubt, and I find as a fact, that there was the intention to carry on and complete the work, and pay for it by the levy of a sufficient tax in the current year, if the by-law had not been carried, and some arrangement was made respecting the purchase of the tile (the main item of expense of the whole work) even before the first by-law was submitted: but there is no evidence shewing that any contract, legally binding upon the corporation, had been made, nor that any valid debt of the corporation falling due within the year, had been incurred, before the second by-law was passed.

It is true that, in respect of local improvements, express provision is made in section 619, for the borrowing of money for carrying on and completing the work, before making assessments and passing the necessary by-law

Judgment. authorizing the issue of debentures; for the purpose of Meredith, J. avoiding supplementary assessments, or refunding over-assessments. But the case of local improvements is quite different: there the council would have no power, but for this section, to proceed at all; until the by-law passed any action would be *ultra vires*: here it is not contended that they had not power to do the work as an ordinary expenditure payable within the year; they were proceeding *intra vires*, and could not be restrained, as they might in the other case, so that in this case it becomes merely a question whether it should be so paid for, or payment extended over a number of years. It was not suggested that the expenditure was not one which might properly be so, in effect, extended: that it was not a case in which the money might be borrowed and repayment made as provided for in the by-law.

I was referred to no case bearing upon the question, and have found none very helpful in its solution, but may refer to *The Corporation of the Township of Barton v. The Corporation of the City of Hamilton*, 18 O. R. 199; *The Corporation of the County of Wentworth v. The Corporation of the City of Hamilton*, 34 U. C. R. 585, and the cases referred to in the notes to section 357 of the Act in Harrison's Municipal Manual, 5th ed., at pp. 268-70, as containing some expressions bearing upon the question.

I cannot say that the by-law is invalid on this ground.

The other two grounds are, in my opinion, answered by the fact that the work is not a sewer, but a drain in a natural watercourse: it is true that in the by-law it is called a sewer, the word originating, no doubt, in the engineer's report where it is written of as "a drain to be known as the Huron Street Sewer," and again as the "tile drain" and "open drain." It is only the misuse of it as a sewer that may cause litigation by, or complaint from, the owners of the land through which the open portion runs: and it is in the power of the defendants to prevent any such misuse.

Having regard to section 479, sub-section 15, of the Act,

55 Vict. c. 42, (O.), and to sections 20 and 26 of "The Ditches and Watercourses Act," R. S. O. 1887, c. 220, I cannot doubt the defendants' power to pass a by-law for the doing of this work, notwithstanding that part of it was to be done on land not in but adjacent to the municipality, without the consent of any other corporation, though required for other purposes under other sections of the Act: see *The Corporation of the Township of Barton v. The Corporation of the City of Hamilton*, 17 A. R. 346 and 20 S. C. R. 173. Judgment.
Meredith. J.

Apart from any expressly enabling or disabling provision contained in the Act itself, I would not consider the expenditure of the money expended in this case, for the work done beyond the territorial limits of the municipality, for the necessary purpose of keeping in a proper state of repair and efficiency the outlet of an existing drain, a contravention of the general provision respecting the jurisdiction of municipal councils contained in section 282, or of any principle of municipal government: see *Township of Barton v. City of Hamilton*, 18 O. R. 199. That surely might be done without compulsion which might be compelled under the "Ditches and Watercourses Act." It is quite a different thing where a new drain is to be constructed, and land or rights in land must be acquired before that can be done.

It must be borne in mind that in no sense are the rights of other municipalities or persons concerned in the work being dealt with, but merely the rights of the plaintiff to prevent the expenditure of money of the ratepayers upon it and to save them from loss by reason of the alleged unauthorized character of the work.

The action wholly fails, and must be dismissed, with costs.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

REGINA V. SOMERS.

Justice of the Peace—Summary Conviction—Lord's Day Act, R. S. O. ch. 203—Cab-driver—Offence—Uncertainty—Costs.

A cab-driver is not within any of the classes of persons enumerated in section 1 of the Lord's Day Act, R. S. O. ch. 203, and cannot be lawfully convicted thereunder for driving a cab on Sunday.

Conviction of the defendant under the Act for unlawfully exercising the worldly business of his ordinary calling as a cab-driver on the Lord's day:—

Held, bad for uncertainty.

The practice is not to give costs on quashing a conviction.

Regina v. Johnston, 38 U. C. R. 549, followed.

Statement.

MOTION to make absolute a rule *nisi* to quash a summary conviction of the defendant by Mr. Baxter, a justice of the peace for the city of Toronto, acting for and at the request of the police magistrate, under the Lord's Day Act, R. S. O. ch. 203.

The conviction was "for that he, the said Thomas Somers, being a cab-driver, on the 5th day of March, 1893, at the city of Toronto, in the county of York, being the Lord's Day, did unlawfully exercise the worldly business of his ordinary calling as such cab-driver (the same not being the conveying of travellers or Her Majesty's mail, by land or by water, nor selling drugs and medicines, nor other works of necessity, nor works of charity), contrary to the form of the statute," etc.

The defendant was a servant of one Charles Brown, the keeper of a livery stable in the city of Toronto, and on the day in question drove a cab belonging to Brown through the streets of the city, for hire.

R. S. O. ch. 203, sec. 1, is as follows: "It is not lawful for any merchant, tradesman, artificer, mechanic, workman, labourer, or other person whatsoever, on the Lord's Day, to sell or publicly shew forth, or expose, or offer for sale, or to purchase, any goods, chattels, or other personal property, or any real estate whatsoever, or to do or exer-

cise any worldly labour, business or work of his ordinary calling (conveying travellers or Her Majesty's mail, by land or by water, selling drugs and medicines, and other works of necessity and works of charity only excepted.)" Statement.

November 24, 1893. *Tytler* moved the rule absolute before the full Court (ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ.) He contended that the defendant did not come within any of the classes of persons mentioned in the section quoted, citing *Regina v. Budway*, 8 C. L. T. Occ. N. 269.

Du Vernet, for the informant, shewed cause.

THE COURT held that the words of the section did not apply to nor include the defendant, a cab-driver; and also that the conviction was bad for uncertainty, because it did not specify the act or acts which constituted the offence against the statute, referring to *Regina v. Spain*, 18 O. R. 385; and therefore that the conviction should be quashed.

Tytler asked for costs against the informant.

Du Vernet asked that there should be an order providing that no action should be brought against the magistrate or informant.

THE COURT referred to *Regina v. Johnston*, 38 U. C. R. 549, where it is laid down that the practice is not to give costs on quashing a conviction; and also remarked that the defendant could recover the costs in an action.

Rule absolute quashing the conviction without costs.

No order for protection.

[QUEEN'S BENCH DIVISION.]

REGINA v. COULSON.

Justice of the Peace—Summary Conviction—Certiorari—Evidence—Uncertainty—Amendment—Ontario Medical Act, R. S. O. ch. 148, sec. 45—Practising Medicine—Quashing Conviction—Costs.

Where a summary conviction, valid on its face, has been returned with the evidence upon which it was made, in obedience to a *certiorari*, the Court is not to look at the evidence for the purpose of determining whether it establishes an offence, or even whether there is any evidence to sustain a conviction.

Regina v. Wallace, 4 O. R. 127, followed.

But where a conviction for an offence over which the magistrate had jurisdiction, is bad on its face, the Court is to look at the evidence to determine whether an offence has been committed, and if so, it should amend the conviction.

A conviction under the Ontario Medical Act, R. S. O. ch. 148, sec. 45, for practising medicine for hire:—

Held, bad for uncertainty in not specifying the particular act or acts which constituted the practising.

Re Donnelly, 20 C. P. 165; *Regina v. Spain*, 18 O. R. 385; and *Regina v. Somers*, *ante* p. 244, followed.

And the Court refused to amend, and quashed the conviction, where the practising consisted in telling a man which of several patent medicines sold by the defendant was suitable to the complaint which the man indicated, and selling him some of it.

Costs against the informant refused.

Regina v. Somers, *ante* p. 244, followed.

Statement.

ON the 10th April, 1893, the defendant was summarily convicted before the police magistrate for the city of Toronto, "for that he, the said F. W. Coulson, in the month of March, 1893, at the city of Toronto, in the county of York, not being registered pursuant to the Ontario Medical Act, for hire, gain, and hope of reward, unlawfully did practise medicine contrary to the form of the statute," etc., and was adjudged to pay a fine of \$100, or be imprisoned for thirty days unless that sum should be sooner paid.

A writ of *certiorari* having been issued, the magistrate returned the conviction, information, and the evidence taken before him. The only witness for the prosecution was one William Boyd, who swore that on the 27th March, 1893, he went to 24 Macdonell avenue, in the city of

Toronto, and saw the defendant there. He had previously
seen an advertisement and written a letter to the defendant. He asked the defendant if he was the doctor, and the latter said yes. The defendant looked for and got the witness's letter. The defendant said he supposed the witness wanted to be doctored, and the witness said he did. The defendant asked the witness what was the matter with him, what his symptoms were, and said he should take treatment "8 c." The defendant gave him some medicine, for which he paid him \$7. On cross-examination the witness said: "I told defendant that I had the gleet. He said my disease came under treatment '8 c.' I agreed to pay him \$12 for his services. He said my medicine was a very careful medicine to mix, and that it would not be ready for some time, but he would send it to me."

Statement.

The defendant was a witness on his own behalf, and said that he remembered witness Boyd; that he got his letter, and sent him a book and a price list of medicines. Boyd called at 24 Macdonell avenue and asked if that was Mr. Lubon's. The defendant said his name was Coulson, and that he was agent for Lubon's specifics. Boyd asked him for a package of his "8 c" treatment. The defendant told him that he shipped all medicines from his down town office; did not prepare him any medicine, because they were all prepared at a wholesale druggist's in Toronto, or shipped from Philadelphia already compounded. Cross-examined, the defendant said that he was not a doctor, and did not tell Boyd he was; he did not tell Boyd that it would take some time to prepare the medicine; he was in the habit of selling his proprietary medicines, but he did not prescribe for people.

May 19, 1893. *Aylesworth*, Q. C., obtained a rule *nisi* to quash the conviction, upon the ground that the evidence did not shew that the defendant practised medicine, and that upon the evidence the defendant had not committed

Argument. or been guilty of any offence whatever prohibited by the Ontario Medical Act,* or otherwise.

November 27, 1893. *Aylesworth*, Q. C., supported the rule before the full Court (ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ.). The evidence discloses no offence. What the defendant did was not practising medicine. [ARMOUR, C. J.—Can we interfere on that ground?] If there is absolutely no evidence, the Court can quash the conviction. If the case were being tried with a jury, the trial Judge, if there were no evidence, would not allow it to go to the jury. If there was no evidence before the magistrate which would be evidence to go to a jury, the Court should quash the conviction. I refer to *Regina v. Stewart*, 17 O. R. 4. I also take exception to the conviction on the ground that no wrongful act is specified in it. All that is said is that the defendant practised medicine. I refer to *Regina v. Somers*, decided this term,† and *Regina v. Spain*, 18 O. R. 385. Also, there must be more than one act to constitute practising: *Apothecaries Co. v. Jones*, [1893] 1 Q. B. 89; *Re Horton*, 8 Q. B. D. 434.

H. S. Osler, for the informant. Under *Regina v. Hall*, 8 O. R. 407, this was clearly practising medicine. It was a case of professional knowledge exercised with a view to selling medicine. It was what would be called in England practising as an apothecary, and that our Act forbids. I refer to *Apothecaries Co. v. Nottingham*, 34 L. T. N. S. 76, and the definition of “apothecary” in Wharton’s Law Lexicon.

Aylesworth, in reply, referred to *Woodward v. Ball*, 6 C. & P. 577.

*R. S. O. ch. 148, sec. 45.—It shall not be lawful for any person not registered to practise medicine, surgery, or midwifery for hire, gain, or hope of reward; and if any person not registered pursuant to this Act, for hire, gain, or hope of reward, practises or professes to practise medicine, surgery, or midwifery, or advertises to give advice in medicine, surgery, or midwifery, he shall upon a summary conviction thereof * * for any and every such offence, pay a penalty not exceeding \$100 nor less than \$25.

† Now reported, *ante* p. 244.

At the close of the argument the judgment of the Court was delivered by

Judgment.
Armour, C.J.

ARMOUR, C. J.:—

We think we cannot uphold the conviction. We do not proceed upon the ground that there was no evidence of an offence. Where the conviction is valid on its face, we are not to look at the evidence for the purpose of determining whether an offence is established by it. That is a matter for the magistrate, and for the appellate court where there is an appeal: see *Regina v. Wallace*, 4 O. R. 127. The conviction here is bad because it does not specify the particular act or acts which constituted the alleged practising of medicine. We have no statute such as they have in England, saying that the words of the statute shall be sufficient. In *Regina v. Spain*, 18 O. R. 385, and *Regina v. Somers*, this term, we quashed the convictions on this ground. *Regina v. Spain* was founded on *Re Donnelly*, 20 C. P. 165. This conviction is, therefore, bad on its face; but the magistrate had jurisdiction, and we ought, therefore, to look at the evidence to see if an offence was committed; and if so, we should amend the conviction. But, looking at all the evidence, we cannot come to the conclusion that an offence was committed of the nature specified in the conviction; we cannot hold that what the defendant did on the occasion in question was practising medicine within the meaning of the statute. The conviction will, therefore, be quashed.

Aylesworth, Q. C., asked for costs against the informant.

ARMOUR, C. J.:—

The practice is not to give costs, as we had occasion to say the other day in *Regina v. Somers*. In *Regina v. Hazen*, 23 O. R. 387, we gave costs against the informant, but that was under peculiar circumstances.

Rule absolute without costs. No order for protection.

[QUEEN'S BENCH DIVISION.]

REGINA V. DICKOUT.

Marriage—Solemnization of—Minister—"Religious Denomination"—R. S. O. ch. 131, sec. 1.

"The Reorganized Church of Jesus Christ of Latter Day Saints" is a religious denomination within the meaning of R. S. O. ch. 131, sec. 1; and a duly ordained priest thereof is a minister authorized to solemnize the ceremony of marriage.

Upon a case reserved, a conviction of such a priest for unlawfully solemnizing a marriage was quashed.

Semble, the words of the statute "church and religious denomination" should not be construed so as to confine them to Christian bodies.

Statement. CROWN case reserved.

The defendant was on the 21st June, 1893, charged before the police magistrate for the town of Niagara Falls for that he did on the 19th May, 1893, at that town, unlawfully and without lawful authority, solemnize a marriage between Abraham H. Taylor and Alice E. Vance, contrary to the form of the statute. He elected to be tried summarily, before the magistrate, and pleaded not guilty. Upon the trial, upon the 3rd July, 1893, the evidence disclosed that the defendant was a member of an organization known as "The Reorganized Church of Jesus Christ of Latter Day Saints," and was on the 22nd June, 1891, ordained by order of the district conference in Canada as a priest in that Church, with power to administer the ordinances thereof agreeably to the authority of that office, including that of solemnizing marriages; that the organization was an incorporated denomination in the United States, but not in Canada, though it had been conducting religious services in Canada for thirty years; that in the organization the Bible was taken as the foundation of the faith of the members, who subscribe to the book of Mormon, and hold it as of equal authority with the Bible; that the defendant on the 19th May, 1893, performed the ceremony of marriage between Abraham H. Taylor and Alice E. Vance.

The magistrate convicted the defendant of the offence charged, but reserved for the opinion of the Justices of the Queen's Bench Division the following questions: Statement.

1. Is the organization known as "The Reorganized Church of Jesus Christ of Latter Day Saints" a church and religious denomination within the meaning of R. S. O. ch. 131, sec. 1?

2. Are the persons designated as priests and ordained and appointed as such, according to the ceremonies of that organization, ministers and clergymen of a church and religious denomination within the meaning of the section?

The magistrate reported, with the case stated as above, all the evidence taken and copies of exhibits, from which the following statements are taken:

The church in question subscribes to the book of Mormon, but the Bible is the foundation of its faith. The book of Mormon is a sacred inspired history of a people who inhabited this continent ages ago, and of whom the Indians are the descendants. This book is of equal authority with the Bible. This church denounces polygamy, though the Latter Day Saints of Utah teach it.

Under the presidency of Joseph Smith the church became a corporate body, and adopted as a constitution or form of church government and discipline, the Scriptures, the book of Mormon, and book of doctrine and covenants. This book was presented to the church in general assembly, and was adopted unanimously. It then became a part of the law of the church, and the church became bound by its provisions, equally as by those of the Bible and book of Mormon.

The following epitome of faith and doctrines was given:—

Belief in the Trinity.

Belief in punishment of men for their own sins, and not for Adam's transgression.

Belief that, through the atonement of Christ, all men may be saved, by obedience to the laws and ordinances of the gospel, which are:

Statement.

1. Faith in God and in Jesus Christ.
2. Repentance.
3. Baptism, by immersion.
4. Laying on of hands.
5. The resurrection of the body ; that the dead in Christ will rise first ; and the rest of the dead will not live again until the thousand years shall have expired.

6. Eternal judgment, rewards and punishments according to degree of good or evil.

Belief that a man must be called of God and ordained by the laying on of hands to entitle him to preach and administer ordinances.

Belief in the kind of organization that existed in the primitive Church.

Belief that in the Bible is contained the Word of God, so far as it is translated correctly.

Belief that the canon of scripture is not full, but that God will continue to reveal His word to man.

Belief in the powers and gifts of the gospel.

Belief that marriage is ordained of God, and that the law of God provides for but one companion in wedlock.

Belief that the doctrines of a plurality and the community of wives are heresies and opposed to the law of God.

Belief that all men should be allowed to worship God according to conscience.

By R. S. O. ch. 131, an Act respecting the solemnization of marriages, sec. 1, it is provided: "The ministers and clergymen of every church and religious denomination duly ordained or appointed according to the rites and ceremonies of the churches or denominations to which they respectively belong, and resident in Ontario, may, by virtue of such ordination or appointment, and according to the rites and usages of such churches or denominations respectively, solemnize the ceremony of marriage between any two persons not under a legal disqualification to contract such marriage."

November 27, 1893. The case was argued before Argument.
 ARMOUR, C. J., and FALCONBRIDGE and STREET, JJ.

J. R. Cartwright, Q. C., for the Crown. This religious body is not within the words "church and religious denomination." If their ministers wish to celebrate marriages, they should obtain a special Act. Since the general Act, the Disciples of Christ and the Salvation Army have obtained legislation giving special power to their ministers or officers to solemnize marriages. In 1857 this body had no existence in this Province. The witnesses say that the society is incorporated in the United States, but the incorporation is not proved by legal evidence. Christianity is part of the law of this Province: *Pringle v. Town of Napanee*, 43 U. C. R. 285. The statute must be read as meaning "Christian church and denomination." The book of doctrine and covenants is in no sense Christian. The test to apply is whether the Bible is the basis of faith. Here the religious body has authorities of equal weight with the Bible, and in some respects opposed to its teaching. I refer to *Hale v. Everett*, 53 N. H. 9; *Simpson v. Welcome*, 72 Me. 496. A religious society or denomination means an incorporated society: *Weld v. May*, 9 Cush. at p. 188.

Dymond, on the same side, referred to R. S. O. ch. 236, sec. 1; The Marriage Amendment Act, 1891, 54 Vic. ch. 23, (O.); Maxwell on Statutes, 2nd ed., pp. 40-43.

W. M. German, for the defendant, was not called upon.

At the conclusion of the argument, the judgment of the Court was delivered by

ARMOUR, C. J.:—

We think it quite clear that this conviction cannot be maintained. The defendant was clearly a duly ordained minister of this religious body, and there is no doubt that it is a religious denomination within the words of the statute. Assuming that Christianity is the law of the land

Judgment. in a sense, there is nothing contrary to Christianity in the
Armour, C.J. tenets of this body. It is true they have some authorized
works supplemental to the Bible, but that is the case with
every church or denomination. The Church of England
has its creeds, and the Presbyterian Church its confession.
That does not make the church an anti-Christian one.
The statute should receive a wide construction. It does not
say "Christian," but "religious." If it said "Christian,"
it would exclude Jews. The fundamental law of the
Province makes no distinction between churches or de-
nominations. Every person is at liberty to worship his
Maker in the way he pleases. We have, or ought to have,
in this country, perfect freedom of speech and perfect free-
dom of worship.

Conviction quashed.

[CHANCERY DIVISION.]

GRAHAM ET AL.

V.

THE CANANDAIGUA LODGE NO. 236 OF THE INDEPENDENT
ORDER OF ODDFELLOWS OF THE STATE OF NEW YORK.*Will—Domicil—Forum—Legacy to Unincorporated Association—
Validity of.*

A testator domiciled in the State of Missouri, U.S., at the time of the execution of his will and at the time of his death, bequeathed personal property situate in this Province to a Lodge of Oddfellows in the State of New York, U.S., which, although unincorporated at the time of the testator's death, was subsequently authorized by law to take and hold, in the names of trustees, property devised to the lodge.

In an action to test the validity of the bequest :—

Held, that the parties having selected their forum in this Province the action must be dealt with here according to the law of the testator's domicil, which in the absence of evidence to the contrary would be presumed to be the same as the law of this Province :—

Held, also, there being no prohibitory law of the legatees' domicil, the bequest to the lodge was a valid bequest to the members thereof, and that the trustees of the lodge could be added as parties defendants, on behalf of all the members.

Walker v. Murray, 5 O. R. 638 followed.

THIS was an action brought by George Graham, as Statement.
executor, and Christopher Burrell and others, relatives and
next of kin of Richard Burrell, deceased, to test the validity of certain bequests made by him in his will to the
defendants.†

Richard Burrell had made his will in Ontario in 1880 where all his property was, which consisted solely of personalty, and died in 1891 in the State of Missouri, which was his domicile both at the time of the making of the will and at the time of his death.

The defendants were an unincorporated Lodge of Oddfellows in the State of New York at the time of the testator's death, but subsequently availed themselves of the provisions of a law of that State, enabling them to acquire property in the names of trustees.

The clause in the will in question was as follows : " The balance of my personal or other property after paying

Statement. * * shall be divided as follows, viz., to the Oddfellows' Golden Star Lodge of Brampton, county of Peel, one-fourth; to the Canandaigua Oddfellows' Lodge 236, State of New York, one-fourth; to the Oddfellows' Lodge nearest the place of my residence at the time of my death, one-fourth; and the balance to the lodge to which I may happen to belong at the time of my death."

The defendants claimed the second and last mentioned fourths.

The action was tried at Toronto on September 29th, 1892, before MEREDITH, J., when evidence was taken and the trial was adjourned for the production of additional evidence of the law of the State of New York, and was continued subsequently when such evidence was furnished.

J. H. Macdonald, Q.C., for the plaintiffs. The defendants claim two-fourths of the estate; one, by virtue of the devise to them by name; and the other, as the lodge to which the testator belonged at the time of his death. The testator's domicile was in the State of Missouri, and the property was situate and the executor lived in Ontario. The defendants were not incorporated, and the evidence shews that by the law of the State of New York, which was their domicile, they are not empowered to take.

Moss, Q.C., for the defendants. The law of New York does not apply, but rather the law of Missouri, and there is no evidence of what that is. The pleadings shew the estate is all personalty. All questions affecting the estate must be governed by the law of the domicile of the testator. The State of New York has no control over the fund. The defendants were entitled, at the time of the death, to take, as individuals of an association, and their subsequent incorporation cannot take away that right so as to defeat the intention of the testator. Then another question arises. Has this Court jurisdiction? The fund should be sent to Missouri and administered there. The probate should be there. The Court here has a twofold difficulty in deciding whether New York law is applicable, and how a Missouri

Court would deal with it even if it is applicable. I refer Argument.
to *Parkhurst v. Roy*, 7 A. R. 614; *Walker v. Murray*, 5 O. R. 638; *Smith v. The Methodist Church*, 16 O. R. 199; Wharton's Conflict of Laws, 576, 577; *Cross v. United States Trusts Co.*, 25 Abbott's N. C. (N. Y.) at p. 172; *Despard v. Churchill*, 53 N. Y. 192; *Enohin v. Wylie*, 10 H. L. C. at pp. 16, 17; *Banks v. Phelan*, 4 Barb. (N. Y.) 80; *Downing v. Marshall*, 23 N. Y. 366; *Sherwood v. The American Bible Society*, 1 Keyes 564; *White v. Howard*, 46 N. Y. 144.

Macdonald, Q.C., in reply. The defendants have submitted to the jurisdiction of this Court, and so have chosen their forum. I refer to Morawetz on Corporations, 1st ed. secs. 161, 162; *Canadian Pacific R. W. Co. v. The Western Union Telegraph Co.*, 17 S. C. R. 151, at p. 155; Dicey's Law of Domicil, 198, 199; Grant on Corporations, 111, 123; *Chamberlain v. Chamberlain*, 43 N. Y. 424.

October 26, 1893. MEREDITH, J. :—

The conclusion of the trial of this action has been delayed, from time to time, to enable the parties to furnish additional evidence respecting the law of the State of New York upon the question of the legatees' capacity to take the legacies in question, that furnished when the case first came on for trial being, for the reasons stated at the time, inconclusive and unsatisfactory. At length that additional evidence has been furnished, and I am enabled to dispose of the case.

It was suggested by Mr. Moss, in his argument, that the case might be one in which the Court would decline to determine the matters in question between the parties—if it had jurisdiction at all—and direct that the fund be sent to the State of Missouri—the domicil of the testator—to be administered there, especially as there is the double difficulty of determining what the law of the State of New York is, and how, according to the law of the State of Missouri, the question whether or not the law of the former

Judgment.
Meredith, J. State should prevail, should be dealt with ; but, though the determination of the matters in question by the Courts of the latter State would doubtless have been in the end more convenient, and, perhaps, satisfactory, the parties have not chosen such a forum, but have come before this Court each asking its interposition, and seeking its aid, without any suggestion, until the argument, of even inconvenience in the trial and determination of the issues here ; and I can perceive no sufficient reason, under all the facts and circumstances of the case, for refusing to hear and determine the matters in question, or for making any such direction as was suggested, even if there were the right to do so : see *In re Trufort, Trafford v. Blanc*, 36 Ch. D. 600.

Then, dealing with the substantial matters now in question between the parties, the plaintiffs' contention shortly stated is, that the legacies in question are invalid because, as they contend, the legatees are and always were domiciled in the State of New York, and were, at the time of the testator's death, not capable, under the laws of that State, to take any bequests, and that the law of such domicile, not that of the testator's domicile, prevails upon the question of the validity of such bequests.

There is no difficulty or dispute as to most of the general principles bearing upon the case. The difficulty and dispute are rather, as to the applicability of one of them to the main question in issue.

The testator having, admittedly, his domicile at the time of making of the will, and until, and at, the time of his death, in the State of Missouri, the case must, generally, be dealt with according to the law of that State, although the will was made, and the whole of the estate is, in this Province. And, there being no evidence whatever as to the law of that state, it must be taken to be the same as that of this Province, and may be so taken with the greater confidence in a matter of so general a character, in which the laws of all such countries are doubtless very much alike in their main features: see *Re Central Bank—Canada Shipping Co.'s Case*, 21 O. R. 515.

It was not contended that, if the legatees were domiciled in this Province, there would be any valid objection to the bequest; the objection to them was based entirely upon the law of the State of New York. It is, therefore, for the plaintiffs to prove such law, and that these legatees come within its scope, and to shew that effect should be given to it in this Court. Judgment.
Meredith, J.

The weight of evidence upon these questions is certainly in favour of the plaintiffs, if the depositions and affidavits only are looked at; they seem to prove that, according to the law of New York, the legacies in question could not, in any way, take effect; and that, according to the law as administered in that State, the law of the domicile of the legatee must prevail; but, after an examination of all the cases relied upon by the witnesses who supported the former proposition, and cited by them as the basis of their opinion upon that question, I find none that support it in any case quite like this: see *Concha v. Murrieta, De Mora v. Concha*, 40 Ch. D. 543, and [1892] A. C. 670; *Huntingdon v. Attrill*, [1893] A. C. 150; 20 A. R. (Appendix).

But in the view which I take of this case, this question is one of the proper construction of the will; a question to be dealt with according to the law of the domicile of the testator; and, therefore, the evidence respecting it is not material, though helpful as an argument; and I prefer to rest my judgment upon it on the cases in our own Courts whatever might have been the effect of such an argument, if there were none such in point, and, accordingly, following *Walker v. Murray*, 5 O. R. 638, and cases of that kind hold that the bequests in question are according to the law of this Province, valid bequests to the members of the Association, that is of "Lodge 238," as described in the will. There is no uncertainty as to that; "they are a class easy of ascertainment."

If the will be read, "to the Canandaigua Oddfellows' Lodge 238, of the State of New York," from all points of view the gift is to the members; whilst if it be read, "to the Canandaigua Oddfellows' Lodge 238, of the State of

Judgment. New York," in the eyes of the law, there being no incorporated body, the whole of the members are the body indicated; they only could sue or be sued in respect of, or take or transfer, such property. The gift is not for any expressed purpose or upon any expressed trust.

Then, if that be the proper construction of the will, have the plaintiffs shewn that such legatees are incapable of taking, according to the law of New York? Certainly not. The witnesses say that the legatees cannot take as a corporation, because they did not avail themselves of the enactment permitting them to take, in the way provided by the enactment in question, until after the testator's death, and as an unincorporated body they could not take; but they do not, as I gather their meaning, say that as individuals, described as members of the Association, they could not take, but only that the will does not so give the legacies to them; so that it seems to me the plaintiffs' case fails upon this question of fact, the onus of proving which was upon them.

And beside this, the plaintiffs have not satisfied me that in such a case as this the "capacity of a legatee to take depends upon the law of his domicile." I understand the general rule in favour of the law of the domicile of the testator or intestate in respect of moveables to cover a case of this kind, though that law in some cases accepts the status of the legatee under the law of his domicile or domicile of origin: see *In re Goodman's Trusts*, 17 Ch. D. at p. 296; *In re Andros, Andros v. Andros*, 24 Ch. D. 637; *In re Grove, Vaucher v. The Solicitor to the Treasury*, 40 Ch. D. 216; *In re Gray's Trusts, Gray v. Stamford*, [1892] 3 Ch. 88.

The trend of the more recent cases seems to be decidedly towards accepting an enabling status under the law of the domicile of the legatee, by the law of the domicile of the testator, though the latter professedly applied, but as yet the English cases have gone, upon the question of legitimacy, as far only as accepting the status according to the law of the domicile of origin, and in the Goodman case it seems hard

to have stopped short there and so have deprived some of the children, legitimate according to the law of their domicile at the time when the will was made, and when it took effect, of the testator's bounty; but I have neither been referred to nor found any case in which a disabling status of the same nature has been given effect to: see *In re Hellman's Will*, L. R. 2 Eq. 363; *Lynch v. The Provisional Government of Paraguay*, L. R. 2 P. & D. 268; *Macdonald v. Macdonald*, L. R. 14 Eq. 60. Judgment.
Meredith, J.

It may be that a positive prohibitory law of the domicile of the legatee might prevent the giving effect to a bequest which would contravene it, but there is nothing of that character alleged in this case: see *Santos v. Illidge*, 8 C. B., N. S., 861.

If the rule were that the law of the domicile of the legatee must prevail as to capacity to take, ought it not to follow also that in cases of intestacy, persons entitled as next of kin under the laws of the intestate's domicile, would be excluded if incapable of taking according to the laws of their domicile? For instance, would not the respondent in the case of *Doglioni v. Crispin*, L. R. 1, H. L. 301, if domiciled in England at the time of Henry Crispin's death, have had no interest in his estate, being by the law of England, illegitimate and incapable of taking?

It is quite true that the law of the legatee's domicile may prevent a legatee taking; for instance, in the case of a corporation created by a foreign state: if by the law of that state, it is incapable of taking by devise or bequest, such incapacity would prevail everywhere. Being an artificial body, created under the law of such state, its powers and capacities would be such as were so given by it, and no more: what would be *ultra vires* of it there would be equally so everywhere: if created with but one hand, it could be but one-handed everywhere.

The case of *Chamberlain v. Chamberlain*, 43 N. Y. 424, upon which the contention that the right or capacity to take depends upon the law of the legatee's domicile has, in this case, been altogether based—was one of this character, as

Judgment. also was *Re Huss*, 126 N. Y. 537; and if the expressions
Meredith, J. contained in the judgments in such and the like cases be confined to such cases, substantial exception cannot be taken to them, otherwise they would seem to be quite too broad: see *Despard v. Churchill*, 53 N. Y. 192; *Cross v. United States Trust Company of New York*, 131 N. Y. 330; *White v. Howard*, 38 Conn., 342; *Jones v. Habersham*, 107 U. S. 174; *Boe v. Anderson*, 24 Ct. of Sess. Cas., 2nd series, 732; and *Bateman v. Service*, 6 App. Cas. 386.

The case of *Fordyce v. Bridges*, 2 Phillips, 497, referred to in *Chamberlain v. Chamberlain*, does not support the broad contention: what was there held, and followed in *Chamberlain v. Chamberlain*, was merely that the law of the domicil of the testator preventing a gift for a particular purpose within its jurisdiction, but having no extra territorial effect, would not render invalid a gift for the same purpose where it would be valid.

According to the law of this Province, the title to property bequeathed does not pass directly to the legatee, but passes to the testator's legal personal representative; so that even in the fiction of the law as to moveables, the property does not go to the foreign state immediately after the testator's death, there to meet a legatee incapable in the eyes of that law of taking the legacy; but the legatee comes to the state where, in fact and in law, the property is, and where no such incapacity exists, to claim and receive it from the legal personal representative. I speak of course of cases where there is capacity in one state and not in the other, not of cases of corporations lacking everywhere capacity to take.

In all such cases as this, where the question of want of capacity is raised, it is well to ascertain clearly whether the question is capacity to take, or really testamentary capacity to give.

It may be here observed, that there is no evidence in regard to the domicil of these legatees at the time of the testator's death. The question is not referred to by the witnesses for the plaintiffs, no doubt, because their view is

that the legatees had no legal existence at that time. It Judgment.
seems from the whole evidence, including the constitution, Meredith, J.
by-laws and rules of order of the lodge, that members
might be domiciled anywhere (the testator before and
at the time of his death was domiciled in the State of
Missouri), but their lodge was in Canandaigua, and their
meetings held there. So that it can hardly be said that
the plaintiffs have shewn that the legatees were, at the
time of the testator's death, domiciled in the State of New
York.

And it is right that I should not pass over without observation all that has been said as to the effect of the enactment of the State of New York, passed in the year 1873, chapter 417 of the Laws of 1873, upon which both sides relied.

The material parts of the enactment were in these words :

“17. *Oddfellows to have benefit of Act Certificate.* Whenever any lodge of Oddfellows which is or hereafter may be duly chartered by and installed according to the general rules and regulations of the Grand Lodge of the Independent Order of Oddfellows of the State of New York, shall be desirous of having the benefit of this Act, it shall and may be lawful for such lodge at any regular communication thereof, held in accordance with the constitution and laws, to elect three trustees for such lodge for the purpose aforesaid, a certificate of which election and purpose shall be made and subscribed by the first three elective officers of such lodge under their hands, and stating therein the time and place of such election, the regularity thereof, the names of said trustees and the terms severally for which they are allotted to serve, and the name of the lodge for which they are elected. The execution of such certificate shall be acknowledged or proved before some officer authorized to take the acknowledgment of deeds, who shall indorse thereon a certificate of such acknowledgment under his hand, and the same shall be filed in the office of the Secretary of State. Such trustees and their successors shall thereupon be and become

Judgment.
Meredith, J. entitled to all the benefits, rights and privileges, granted by this Act to and for the use and behoof of said lodge, and a copy of said certificate, certified by the Secretary of State, or his deputy, shall be evidence of the right of such trustees to exercise all the rights and privileges conferred by this Act, and said trustees shall thereupon be authorized to take, hold and convey real and personal estate for the charitable purposes of said lodge, not exceeding the clear annual value of ten thousand dollars. L. 1873, ch. 417, sec. 1.

20. *Powers of Trustees.* The trustees of any such lodge and their successors shall be and are hereby authorized to take, hold, and convey by and under the direction of such lodge, and for the use and benefit thereof all the temporalities and property belonging thereto, whether consisting of real or personal estate, and whether the same shall have been given, granted, or devised directly to such lodge, or to any person or persons for their use, or in trust for them or their benefit, and also in their individual names with the addition of their title of trustees aforesaid, to sue and be sued in all Courts and places having jurisdiction, and to recover, hold, and enjoy in trust and subject as aforesaid, all the debts, demands, rights, and privileges, and all Oddfellows' halls, with the appurtenances and all other estate and property belonging to such lodges in whatsoever manner the same may have been acquired, or in whose name soever the same may be held as fully and amply as if the right or title thereto had originally been vested in said trustees, and also to purchase and hold for the purposes and subject as aforesaid, other real and personal estate, and to demise, lease, and improve the same; and such lodge shall have power to make rules and regulations not inconsistent with the laws of this State, nor contrary to the constitution or general regulations of the grand body to which it shall be subordinate, for managing the temporal affairs of such lodge, and to dispose of its property and all other temporal concerns and revenue thereof, and the secretary and treasurer of such lodge, duly elected and

installed according to the constitution and general regulations aforesaid, shall, for the time being, be *ex officio* the secretary and treasurer of such trustees. Id., sec. 4." Judgment.
Meredith, J

It was said in the evidence adduced at the trial that this statute provides a way by which these Associations may become legally incorporated, and, through trustees, competent to take property to a certain extent, and thus negatives by implication the existence of any power to take prior to such corporation; and until the additional evidence was furnished, no other ground or authority was given for the opinions that these legatees could not take, they having failed to avail themselves of its provisions until some time after the testator's death.

But I was then, and yet am, unable to perceive why such an inference should be drawn. The Lodge is not expressly made a body corporate; certain members of the Association are merely given powers, as trustees, to take, hold and convey certain property for the Association, a convenient method of doing that which might before have been and was done in a far less satisfactory way. There was surely, nothing to prevent the members acquiring and holding property in their own names, and using it for such lawful purposes as they might agree upon: the Act gets rid of many, if not all, of such inconveniences; but does it do more than that? Does it not directly recognize such a fact by providing for such trustees taking, holding and conveying the property of the lodge whether the same *shall have been given*, granted or devised directly to the lodge, or to any person, or persons, for their use, or in trust for them, or *for their benefit*, as soon as the Association takes the benefit of the Act? The implication properly, in my opinion, arising from the Act is rather that the Association might have otherwise taken and held such property as this, the Act enabling them only to do, what they might otherwise have done, by and in the name of three of them—constituting the trustees a quasi-corporation.

Judgment. And if this be so these officers could now take for the
Meredith, J. Association these legacies and give a valid acquittance to the executor.

The plaintiffs have, therefore, in my opinion, failed to establish their claim that the legacies in question are illegal and invalid, or to shew any sufficient cause for refusing to give effect to the intention and desire of the testator, plainly shewn in his will, to benefit the members of this Association, of which he was himself so long a member, and from whose members he received, in his lifetime, considerable benefit.

There seems, however, to be a misnomer of the legatees, if not a defect as to parties in this action. I can perceive no right in the legatees, by their description in the will and in the pleadings, to take these legacies, or to litigate these questions; either the members of the Association, or the three officers of it alone, are entitled; the Act does not give the members, or the three officers, the right to take, or to litigate, in the name of the Lodge: but this defect is one of form only; the pleadings may be amended so that these three officers may be sued, in their own names, on behalf of all the members (under C. R. 315), and as trustees, under the Act in question, in the manner prescribed by the Act.

The plaintiffs' action (which is brought to have the legacies declared invalid only) will, therefore, be dismissed.

As to costs, the executor was justified in raising these questions and having them determined before giving effect to the provisions of the will. He has not done so in the usual manner, and has, no doubt, subjected himself to the same treatment in the matter of costs as his co-plaintiffs, by joining with them in this unsuccessful attack upon these legacies; but his co-defendants are not without some ground for claiming to be relieved from the payment of costs, heirs-at-law and next of kin may not unfairly urge that, where there is room for reasonable doubt whether they have been by the will cut off from that which with-

out a valid will the law would give them, they ought not to be compelled to pay the costs of removing such doubt and establishing the will. Here the costs have not been increased by making the executor a co-plaintiff with the next of kin, indeed they must be less, as they were necessary parties and would ordinarily be represented by separate solicitor and counsel instead of, as here, all by the same solicitor and counsel. Nor has this mode of raising the question proved, in this particular case, inconvenient, or more than ordinarily expensive. Upon the whole, therefore, my discretion in the matter of costs will, I think, be best exercised by giving to the plaintiff, the executor, his costs of the action out of the fund, but only as if he brought it in the usual way, submitting the question to the Court without taking part in attacking or upholding the legacies ; and leaving the other parties each to bear their own costs.

Judgment.

Meredith, J

G. A. B.

[QUEEN'S BENCH DIVISION.]

JONES V. MILLER ET AL.

Company—Shareholders—Paid-up Stock—Moneys of Company in Hands of Shareholders—Action by Execution Creditor to Recover—Parties—Addition of—Rules 324, 326—Service on added Parties.

Where the defendants agreed to take stock in a company about to be incorporated, and arranged that their interest in certain land acquired from them by the company should be applied in payment of their stock, and although it appeared that the company took the land over at a price considerably beyond that at which it was acquired by the defendants, yet no fraud being shewn, it was :—

Held, that the shares of stock issued to the defendants, pursuant to the arrangement, upon the incorporation of the company, as fully paid-up shares, must be treated as such in an action by an execution creditor of the company seeking to make the defendants liable upon their shares for the amount unpaid thereon.

The law upon that subject is the same in this Province as that of England prior to the Companies' Act, 30 & 31 Vic. ch. 131.

The plaintiff sought also to recover from the defendants moneys shewn to be in their hands which were really the property of the company :—

Held, that the plaintiff was entitled to judgment against the defendants for payment to him of such moneys ; but the company were necessary parties to the action ; and their consent to being added as plaintiffs not having been filed as required by Rule 324 (b), they should be added as defendants :—

Held, also, a proper case, under Rules 324 (c), and 326, for dispensing with service upon the company, as the defendants already before the Court were directors and the principal shareholders in the company.

Statement. THIS action was tried at the Toronto Summer Assizes, on 17th June, 1893, before MACMAHON, J., without a jury.

The plaintiff alleged in his statement of claim that he was a creditor of the Toronto Brick Company, incorporated under the Ontario Joint Stock Companies Letters Patent Act, and had recovered judgment for \$996.78, with interest from 8th July, 1892, and that he had been unable to realize his claim ; that the defendants Miller, F. B. Polson, and W. Polson were shareholders in the said company, and that their shares were not fully paid up ; that at the time the defendants ceased operating the Toronto Brick Company, the property thereof was sold by the mortgagee, and, after payment of his claim, a surplus in cash remained the property of the Toronto Brick Com-

pany, which was liable and should have been applied in payment of the plaintiff's claim, but the defendants wrongfully, instead of paying the plaintiff's claim with the money, divided the same amongst themselves, thereby depriving the plaintiff of that means of payment of his claim. The claim was that the defendants might be ordered to pay the plaintiff's claim and costs. Statement.

The defendants demurred generally, and said that no execution had been returned unsatisfied for the plaintiff's claim against the company; that if they were shareholders their shares were fully paid up; that the plaintiff by using due diligence might have recovered the amount of his claim against the company; and they put the plaintiff to the proof of all the allegations contained in his statement of claim.

The plaintiff replied that the defendants pretended that their shares had been fully paid up by a conveyance of land by them to the company; that such land was of much less value than the amount pretended to be paid by it; that the issue of the shares to the defendants as paid up shares, in consideration of the transfer of the property, was not in good faith; and he asked for an inquiry as to the value of the land.

The learned Judge, after hearing the evidence, dismissed so much of the action as alleged that the shares of the defendants in the company were unpaid, but ordered that judgment be entered for the plaintiff declaring that the defendants had in their hands \$990 of the moneys of the Brick Company applicable to the payment of the balance of the plaintiff's judgment against the company; the plaintiff to have the right to add the Brick Company as co-plaintiffs; the evidence already given to stand; no right to be reserved to the Brick Company to give any evidence, as it was only interested in seeing that its moneys were applied in the payment of its debts. And he ordered the defendants to pay the plaintiff's costs, except the costs of the issue raised by the third paragraph of the statement of defence, in which they asserted that their shares were fully paid up.

Judgment. The learned Judge's reasons for judgment were as follows :
MacMahon,
J.

September 20, 1893. MACMAHON, J.:—

The East Toronto Brick Company was incorporated under the Joint Stock Companies Letters Patent Act, 1887 (R. S. O. ch. 157), on the 16th day of June, 1888.

The plaintiff recovered judgment against the company in March, 1891, for \$926.04 debt and costs. Writs of *fi. fa.* goods and lands were on the 4th March directed to the sheriff of York (within whose bailiwick the company carried on its business) and delivered to him the same day. The *fi. fa.* goods was returned *feci* as to the sum of \$258.26, and *nulla bona* residue on the 1st April, 1892. The *fi. fa.* lands was returned for renewal in March, 1892, but was not renewed.

The lands owned by the Brick Company, and upon which it carried on its business, were sold under a power of sale in a mortgage given by the company to James A. Proctor, the amount realized by such sale being \$10,650, which I find to be the fair value of such lands when sold on the 29th November, 1891. The defendant J. B. Miller became the purchaser, but he resold to John Logan, and the conveyance was made by the mortgagee (the Brick Company joining therein as assenting parties to the sale) to Logan on the 30th January, 1891.

There was a surplus of \$900 after payment of the amount of the mortgage money, interest, etc., and this sum was divided among the defendants, who are stockholders and directors in the company.

The lands upon which the Brick Company carried on its business was conveyed to the defendant F. B. Polson, the consideration being the sum of \$8,780, and F. B. Polson executed a declaration on the 25th May, 1888, acknowledging that the said lands were held in trust for the defendants Hubner, Miller, William Polson, Macnee, and the said F. B. Polson, and one William Barrett, and agree-

ing to convey to "The East Toronto Brick Company" when incorporated.

Judgment.

MacMahon,
J.

By the letters patent the capital stock of the company is \$40,000, and the "stock taken by each of the applicants is as follows:—By the said Stephen Hubner, the sum of \$7,500, and that such amount has been paid in full by the transfer of property; by the said John Bellamy Miller, William Polson, Franklin Bates Polson, and William Edmund Thompson, each the sum of \$5,000; by the said Frederick William Barrett, the sum of \$1,000; and by the said James Henry Macnee, the sum of \$1,200, and that such amounts have been paid in full in cash and by the transfer of property."

The lands mentioned were owned by Hubner, and were subject to mortgages thereon for \$8,780 when conveyed to F. B. Polson in trust. Hubner's interest in the lands as owner of the equity of redemption appears to have been regarded by the company as worth \$7,500, as it was agreed he should have paid up stock in the company to that amount. John B. Miller, William Polson, F. B. Polson, and William Edmund Thompson, each paid in \$2,000 in cash. Macnee paid \$500 in cash, and Barrett \$500 in cash—in all \$9,000, which sum it was sworn was expended in providing machinery and in carrying on the business of the company, although at the trial not more than \$4,500 was specifically accounted for.

The promoters of the company sent samples of the clay taken from different parts of the land to Philadelphia for analysis, and from the report received the clay was suitable for terra cotta mouldings, and they concluded the property was very valuable.

There was no evidence of a want of *bona fides* in issuing to the defendants shares as being fully paid up shares in the company for the \$9,000 paid in cash and the transfer of the property mentioned: see Lindley on Companies, 5th ed., p. 785; *Currie's Case*, 3 DeG. J. & S. 367; *In re Anglesea Colliery Co.*, L. R. 2 Eq. 379, and L. R. 1 Ch. 555; *Schroder's Case*, L. R. 11 Eq. 131. And in the absence of

Judgment. fraud the Court will not inquire into the value of that
MacMahon, which is taken by the company in payment instead of
J. money: Lindley, *ib.*; *Pell's Case*, L. R. 5 Ch. 11, and L. R.
8 Eq. 222.

The law as above laid down in the text from Lindley and in the cases referred to, was prior to the passing of the Companies Act, 30 & 31 Vic. ch. 131, sec. 25, and governs the present case, as we have no enactment similar to that contained in the 25th section of the Imperial Act. *Scales v. Irwin*, 34 U. C. R. 545, is not an authority in the plaintiff's favour, as the transaction there was not a payment for the stock.

Counsel for the defendants raised the objection that the action is improperly framed. So far as the cause of action is against the defendants as shareholders of the Brick Company for the recovery of unpaid stock, the objection is clearly untenable: see *Gwatkin v. Harrison*, 36 U. C. R. 478; *Page v. Austin*, 26 C. P. 110. Then as to the other cause of action. The \$990 received by the defendants the directors of the Brick Company are the moneys of the company, and therefore applicable to the payment of the plaintiff's claim as an execution creditor of the company. The amount so in the defendants' hands is money owing by them to the company, and cannot be reached by execution at law, and the plaintiff is, I conceive, entitled, not to equitable execution, but to equitable relief, as defined in *Re Shephard*, 43 Ch. D. 131, by the appointment of a receiver; and see also *Ex p. Evans*, 13 Ch. D. at p. 260; *Re Pope*, 17 Q. B. D. at p. 749. However, any amendment necessary and proper should be made. The defendants in this action are virtually the Brick Company, so it is necessary to add the company as a party plaintiff. Voluntary consent would not be given to such addition. The course sanctioned by the Queen's Bench Division in *Hately v. Merchants' Despatch Co.*, 2 O. R. 385, may well be followed in this case, of allowing the plaintiff to add the Brick Company as co-plaintiffs; the evidence already given to stand. But it will not be necessary to

reserve the right to the Brick Company to give any evidence, as it is only interested in seeing that its moneys are applied to the payment of its debts

Judgment.
MacMahon,
J.

There must be judgment for the plaintiff declaring that the defendants have in their hands the sum of \$990 of the moneys of the Brick Company, which they are required to pay to the plaintiff to the amount of the balance due on his judgment against the company, with the interest thereon. The defendants must pay to the plaintiff the costs of the action.

Should the amount so in the defendants' hands be insufficient to satisfy the balance due on the plaintiff's judgment and the interest thereon, the plaintiff, if he so desires—but at the risk of the costs—may have a reference to the Registrar of the Queen's Bench Division as to the application of the \$9,000 paid by the defendants into the hands of the treasurer of the Brick Company.

At the Michaelmas Sittings, 1893, the defendants moved by way of appeal against this judgment, before the Divisional Court, upon the grounds: (1) That there is no evidence to support the findings of fact that the defendants received the sum of \$990, or that the defendants are the directors of the Brick Company, or that the defendants are virtually the said company, or that the defendants paid the sum of \$9,000 to the treasurer of the Brick Company. (2) That there is no power to add the Brick Company as parties plaintiff without their written consent. (3) That the plaintiff is not entitled to any relief upon his pleadings. (4) That the distribution of the \$900 amongst the shareholders was made in good faith and without notice of the plaintiff's claim, and that in any event each shareholder can only be held liable for the amount of money actually received by him. (5) That the defendants are not liable to pay to the plaintiff, nor is the plaintiff entitled to receive through a receiver or otherwise, the said \$900 under the circumstances of this case. (6) That the plaintiff should be remitted to his remedy, if any, under

Argument. the Winding-up Acts, and the defendants at all events should be entitled to set off their claims against the company in answer to any claims by the company or the plaintiff against them. (7) That the said company if made parties should have the right to call evidence so as to set out the true facts of the case, and the defendants should also be entitled to call such evidence as they would have been entitled to call had the company been parties plaintiff on the record. (10) That the defendants, having succeeded on the only issue at the trial, should have their costs.

The plaintiff during the same sittings also appealed against so much of the judgment as ordered that his action should be dismissed in so far as it claimed relief against the defendants upon the ground of their holding unpaid stock in the company.

Both appeals came on together for argument on 24th November, 1893, before the Divisional Court [ARMOUR, C. J., and STREET, J.]

W. R. Riddell, for the defendants. The action was originally by way of *sci. fa.* under R. S. O. ch. 157, sec. 61. The other claim was set up by amendment. According to strict rights, the plaintiff cannot take the fund. The trial Judge had no power to add the company as a party, and if he had, he should not have done so: *Walcott v. Lyons*, 29 Ch. D. 584; at any rate he should have done so only on payment of costs: *ib.* at p. 587. I refer also to *Turquand v. Marshall*, L. R. 6 Eq. at pp. 123, 124; *Overend v. Gibb*, L. R. 5 H. L. at p. 503; *Spackman v. Evans*, L. R. 3 H. L. 171, 234; *Phosphate Co. v. Green*, L. R. 7 C. P. at pp. 58, 61; *Brotherhood's Case*, 31 Beav. at pp. 374-6; *Re National Funds Co.*, 10 Ch. D. at p. 125; *Society of Practical Knowledge v. Abbott*, 2 Beav. 559; *In re British Seamless Paper Box Co.*, 17 Ch. D. 467, 471; *New Sombrero Phosphate Co. v. Erlanger*, 5 Ch. D. 73. In any case each defendant should only be ordered to pay back the amount he himself received: *Rance's Case*, L. R. 6 Ch. 104. A

creditor without a judgment has no lien: *Mills v. North-ern R. W. Co. of Buenos Ayres*, L. R. 5 Ch. 621; *Coxon v. Gorst*, [1891] 2 Ch. at p. 78. The plaintiff's only way of proceeding properly is under the Winding-up Act: *Cardiff Coal Co. v. Norton*, L. R. 2 Eq. at pp. 563-4; L. R. 2 Ch. 405. The plaintiff could have garnished; the defendants are not trustees: *Poole's Case*, 9 Ch. D. 322. As to the rights under a winding-up order, see *Waterhouse v. Jamieson*, L. R. 2 Sc. App. 29; *Re National Funds Co.*, 10 Ch. D. 118; *Turquand v. Marshall*, L. R. 6 Eq. 112. The company was incorporated under R. S. O. ch. 157. R. S. O. ch. 156, sec. 43, sub-sec. 1, does not apply.

W. R. Smyth, for the plaintiff, cited *Lindley on Companies*, 5th ed., pp. 334, 375; *Emma Silver Mining Co. v. Grant*, 17 Ch. D. 122; *Ramskill v. Edwards*, 31 Ch. D. 100.

December 29, 1893. The judgment of the Court was delivered by

STREET, J.:—

I concur in the finding of my learned brother MacMahon that under the circumstances of the present case the stock held by the defendants in the Brick Company must be taken to be paid up stock. It is shewn that it was part of the arrangement, made before the formation of the company, upon which they took the stock, that their interest in the land acquired from them by the company should be applied in payment of their stock. It is true that the company took the property over at a price considerably beyond that at which the defendants acquired it, but there is no evidence upon which we can find that any fraud was committed, and there is abundant authority that under such circumstances the Court will not undo the transaction and inquire into the sufficiency of the consideration given for shares issued as fully paid up: *Lindley on Companies*, 5th ed., p. 785, and cases there cited. As the learned Judge points out in his judgment, our

Judgment. law upon this subject is the same as that prevailing in
Street, J. England prior to the enactment of the Companies' Act,
30 & 31 Vic. ch. 131.

The plaintiff seeks by the concluding paragraph of his statement of claim to recover from the defendants certain moneys alleged to be in their hands which are really the property of the Brick Company, against whom he has judgment and execution, and he has not made the Brick Company a party to the action. As he is in effect asking that certain property of the Brick Company in the hands of the defendants should be taken from the defendants and paid to him upon his claim against the Brick Company, I think it is plain that the Brick Company are necessary parties to the action, for we cannot make an order against property without notice to the owner: *Re Shephard*, 43 Ch. D. 131.

The learned trial Judge has ordered that the plaintiff be at liberty to amend by adding the company as co-plaintiffs, and the defendants now object that this cannot be done without their written consent, referring to paragraph (b) of Rule 324, which provides that "no person shall be added or substituted as a plaintiff * * without his own consent in writing thereto to be filed." I think the objection well taken, and that the only order which could properly be made in the absence of such consent is an order adding the Brick Company as defendants instead of plaintiffs, and the judgment should be amended accordingly. Taking paragraph (c) of Rule 324 with Rule 326* we have power, I think, in a proper case, to dispense with service upon the

*324 (c). All parties whose names are so added or substituted as defendants shall be served with a writ of summons or notice in manner hereinafter mentioned, or in such manner as may be prescribed by any special order, and the proceedings as against them shall be deemed to have begun only on the service of such writ of summons or notice.

326. Where a defendant is added or substituted, *unless otherwise ordered by the Court or Judge*, the plaintiff shall sue out an amended writ of summons, and serve the new defendant with such writ, or notice in lieu of service thereof, in the same manner as original defendants are served.

added party. The present case appears to be a proper one in which to do so, as the three defendants who have been served are directors of the company, are its principal shareholders, and one of them is its president, or was at the time it was in operation. Having the company before us as parties, we have before us all the persons interested, and I think we can dispose of the matter and make the order for payment of the amount found due by the learned trial Judge. No defence of any kind was set up by the defendants in their pleadings to the right of the plaintiff to recover, beyond a mere denial of the facts stated. We cannot now entertain defences based upon possible states of fact which might have been set up and proved, but as to which we have no evidence before us.

Judgment.

Street, J.

With the amendment suggested, I am of opinion that the judgment of the learned Judge is right, and that the defendants' motion should be dismissed with costs. The plaintiff's cross-motion must also be dismissed, but without costs.

[QUEEN'S BENCH DIVISION.]

BELLAMY ET AL. V. BADGEROW.

Deed—Reformation of—Mortgage—Dower—Omission to Bar—Voluntary Deed—Consideration.

A voluntary deed will not be reformed against the grantor.

And where the defendant's husband, having appropriated moneys of a client in his hands for investment, secretly executed in the client's favour, a statutory mortgage not containing a bar of dower, the defendant being a party to and executing the mortgage, and subsequently after her husband's death paying, with knowledge of the facts, an instalment of interest due under it, an action to reform the mortgage by inserting a proper bar of dower was dismissed, there being no consideration to support a contract by the defendant with the plaintiffs to bar her dower.

Statement.

THE plaintiffs in this action were the executors and trustees of one Thomas Clark, who died in 1889, and the defendant was the widow of George W. Badgerow, a solicitor, who died in July, 1892. The facts of the case were uncontradicted, and may be shortly stated as follows:—

Thomas Clark in his lifetime placed a sum of \$5,000 in the hands of Badgerow for investment upon mortgage, and received from him from time to time interest upon it according to a list of mortgage investments handed to him by Badgerow. After the death of Clark, the plaintiffs, his executors, also received from Badgerow a list of mortgages upon which he asserted that the principal was then invested, and he continued to pay to Mrs. Clark, the widow of Thomas Clark, interest according to this list of mortgages until, being taken ill in January, 1891, he left Canada and went to Bermuda for his health; he returned for a very short time, and died in July, 1892. His partner continued to pay the interest for him until the time of his death, out of office moneys belonging to him. In January, 1891, before leaving for Bermuda, Badgerow prepared a mortgage to the plaintiffs for \$5,000 upon his house; in this instrument he was described as mortgagor; his wife, the present defendant, was named as the party of the second part; and the plaintiffs

were described as mortgagees. It contained a conveyance in the usual statutory mortgage form from Badgerow to the plaintiffs, with a proviso for redemption on payment of \$5,000 and interest, but it contained no grant, release, or bar of dower from the defendant, and although she was named as a party to it, the operative part of the mortgage contained no reference to her. It was prepared without the knowledge of the plaintiffs, and without any request whatever from them, and they were not aware of its existence until some months after Badgerow's death. He and the defendant, his wife, executed it in the presence of their son, after which Badgerow placed it in a pigeon hole at his office, mentioning to his partner that it was an instrument which might be required, or something to that effect. The defendant, at the time she executed the mortgage, did so at the request of her husband, believing that she was barring her dower in the land mentioned in it, but she received no consideration or promise of consideration for doing so, and knew nothing as to the purpose for which the mortgage was given or the circumstances attending it. The mortgage remained unregistered in the pigeon hole in the office until after the death of Badgerow; and it had in fact never been registered. The defendant was made aware before her husband's death of the fact that there were no mortgages to represent the \$5,000 held by her husband for the plaintiffs, except the mortgage in question, and she paid at least one instalment of interest after his death out of her own means. The plaintiffs, upon discovering the state of facts, went to see the defendant, and she then expressed to them her intention of not claiming her dower in the house, but afterwards withdrew from this position. The house was sold in the course of certain proceedings taken for the administration of Badgerow's estate; and, after paying a prior incumbrance, a sum of \$2,000, or thereabouts, remained, out of which the defendant claimed dower, as against the plaintiffs, who claimed to be entitled to the whole sum under the mortgage of January, 1891, free from the defendant's dower.

Statement.

Statement. The present action was brought by the plaintiffs, praying that the mortgage might be reformed and corrected by inserting in it a bar of her dower by the defendant.

The action was tried before ROBERTSON, J., at the Toronto sittings for the trial of actions on 22nd June, 1893, without a jury; and he afterwards delivered judgment as follows:—

October 6, 1893. ROBERTSON, J.—(after stating the facts)—

In *Clarke v. Joselin*, 16 O. R. at p. 78, the learned Chief Justice of the Queen's Bench, says: "No doubt, in order to secure the rectification of an instrument, the clearest evidence, 'irrefragable evidence,' as Lord Thurlow said, is required to be adduced, but it is not meant by that to be laid down that because one of the parties to the instrument chooses to deny that there is any mistake in it, the Court must stay its hand. No doubt the writing must stand as embodying the true agreement between the parties until it is shewn beyond reasonable doubt that it does not embody the true agreement between them. The Court must in such case, as in the case of any other disputed fact, consider all the circumstances surrounding the making of the instrument, and whether it accords with what would reasonably and probably have been the agreement of the parties, gauge the credibility of the witnesses, pay due regard to their interest in the subject matter, and weigh their testimony; and if, having done all this, the Court is satisfied beyond reasonable doubt that the instrument does not embody the true agreement between the parties, the Court ought to rectify it."

In *McNeill v. Haines*, 17 O. R. at p. 485, my learned brother Ferguson says: "As I understand the law on the subject, in order that a deed may be reformed by the Court there must be at least two things established, namely, an agreement differing from the document well proved, that is, proved by evidence in some cases said to

be irrefragable evidence, and in others, evidence that Judgment.
 would strike all minds alike, at all events by such evi- Robertson, J.
 dence as leaves no reasonable ground for doubt as to the
 existence and terms of such agreement, and a mutual mis-
 take of the parties by reason of which such agreement
 was not properly expressed in the deed."

In *Wilkinson v. Nelson*, 9 W. R. 393, a donee of a power of appointment executed the power by deed in favour of some of the objects who were, under the instrument creating the power, to take equally in default of appointment. The appointment did not contain any hotchpot clause. Evidence being brought to shew that the omission of such a clause was a mistake, and that the intention of the donee and of all the parties at the time was to produce equality between the objects taking under and in default of the appointment, the Court ordered the deed of appointment to be rectified by the insertion of a clause similar to the usual hotchpot clause.

Where the Court interferes to rectify a deed, it inquires what was the intention of the parties at the time when the deed was executed, and not what would have been their intention if, when they executed it, the result of what they did had been present to their minds: *S. C.*, per the Master of the Rolls, at p. 395.

The question is not here, as it was in *Bonter v. Northcote*, 20 C. P. 76, whether the wife had actually barred her dower or not, but whether she intended to do so or not. There was evidently a mistake, and that mistake was the creation of the solicitor who drew the mortgage in question. It so happens that the solicitor who was acting for the mortgagees was, in fact, the mortgagor, but he was none the less the solicitor of the mortgagees by reason of that. He had received the money for the purpose of investing it on good mortgage security; he undertook, as solicitor for the person who employed him, to so invest it. He drew the mortgage in question, and intended to make it from the mortgagor of the first part and his wife of the second part, for the pur-

Judgment. pose of barring her dower. She could be a party for no
Robertson, J. other purpose, she had no other interest in the lands, and she says herself she has no doubt that is why her husband asked her to execute; and when she executed it, she thought she was barring, and intended by that act to bar, her inchoate right to dower. The mistake arose, no doubt, in consequence of the solicitor using inadvertently a form of mortgage that was only intended to be executed by one who was unmarried or who did not intend to have the dower barred; in the latter case, the wife would not be asked to be a party. I am satisfied that when the defendant wrote her name to the mortgage in question, she intended thereby to bar her dower in the lands mentioned in the mortgage; and that the omission of the ordinary dower clause was an unintentional omission by all parties concerned.

I think the evidence brings the case within the principles laid down in the cases in regard to reforming deeds or written instruments. Two things have been established. First, an agreement differing from the mortgage in question, viz., an agreement to invest the money left by the late Mr. Clark with the late Mr. Badgerow in good mortgage security. Now, a mortgage made by a married man on his lands could not be said to be a good mortgage security, unless his wife joined with him in the instrument for the purpose of barring her dower. Now, for the purpose of this argument, it may be supposed that Mr. Badgerow, acting for and as solicitor for the mortgagees, agreed with the mortgagor that he would give such a mortgage. I think it fair to assume that such is what Mr. Badgerow would not only insist on, but what was agreed between him and the mortgagor; then, the next step is to prepare the instrument; this he proceeds to do, but unfortunately uses a blank form in which the dower clause is omitted. I think it also fair to assume that he had no intention of omitting that clause, from the fact that he wrote the name of the mortgagor's wife into, and made her a party of the second part in, the mortgage. Not only this, but he pro-

cured her signature thereto, clearly shewing, to my mind, ^{Judgment.} that he, as solicitor for the mortgagees, intended that the ^{Robertson, J.} dower should be barred; and the wife agrees that that was the intention; that there was no other reason for her being asked to execute. It is clear, therefore, that the instrument differs from the agreement that was intended; and that there was a mistake, is made patent by the production of the instrument. The result is that the mistake is one which should be rectified.

But the defendant contends that there was no agreement in writing by which she agreed with the plaintiffs to bar her dower, etc. As to this, I am of opinion that the instrument to which the defendant has attached her name is sufficient evidence in writing of her intention to do what the plaintiffs contend she did in fact do; and, although no agreement was entered into by and between the mortgagees in person with the defendant, the solicitor of the mortgagees agreed with her to all intents and purposes that she should so bar her dower.

I think the plaintiffs are entitled to have the mortgage reformed and corrected by the insertion, following the description of the lands, of a clause in the following words: "And the said Rachel I. Badgerow, wife of George W. Badgerow, hereby bars her dower in the said lands;" and that the defendant should pay the costs of the action.

The defendant moved at the Michaelmas Sittings of the Divisional Court, 1893, to set this judgment aside and enter judgment for the defendant with costs, upon the grounds that the judgment was against law and the evidence; that there was no evidence of any contract between the plaintiffs and the defendant under which she agreed to bar her dower, nor of a mutual mistake by reason of which such contract was not properly expressed; that the defendant received no consideration for any bar of dower on her part; that the mortgage in question was never delivered; and that the alleged agreement to bar her dower was never reduced to writing, and cannot be enforced.

Argument.

The motion was argued on 27th November, 1893, before the Divisional Court (ARMOUR, C. J., and STREET, J.).

Lash, Q. C., for the defendant, related the facts and was stopped by the Court.

E. D. Armour, Q. C., for the plaintiffs. The defendant is estopped from setting up the absence of a contract. In cases of voluntary conveyances the mistake of the conveyancer has been corrected: *Langley v. Brown*, 2 Atk. at p. 203; *Lackersteen v. Lackersteen*, 6 Jur. N. S. 1111; *Wilkinson v. Nelson*, 9 W. R. 393; *Walker v. Armstrong*, 8 DeG. M. & G. 531; *Mortimer v. Shortall*, 2 Dr. & War. 363; *Re De La Touche's Settlement*, L. R. 10 Eq. 599; *Fowler v. Fowler*, 4 DeG. & J. 250. If the instrument is not to be reformed, there should be a declaration of the rights of the defendant with respect to dower, whether she is to have dower out of the whole land or only out of the surplus, as in *Pratt v. Bunnell*, 21 O. R. 1. The defendant is sued as administratrix, as well as personally.

W. H. Grant, on the same side, referred to Story's Equity Jurisprudence, 2nd Eng. ed., secs. 167-9; *Re Clarke and Chamberlain*, 18 O. R. 270; *McKay v. McKay*, 31 C. P. 1; *Bonter v. Northcote*, 20 C. P. 76; *Thompson v. Thompson*, 2 Ch. Chamb. R. 211; *Clarke v. Joselin*, 16 O. R. 68; *White v. White*, L. R. 15 Eq. 247; *Hall-Dare v. Hall-Dare*, 31 Ch. D. 251.

Lash, in reply, referred to *Mackenzie v. Coulson*, L. R. 8 Eq. at p. 375.

December 29, 1893. The judgment of the Court was delivered by

STREET, J.—(after stating the facts as above)—

I am of opinion that this case must be determined upon the short ground that no consideration of any kind existed to support the contract by the defendant with the plaintiffs to bar her dower in the lands in question. The rule is clear that the Court will not reform a voluntary deed as against

the grantor: *Bonham v. Newcomb*, 2 Ventr. 364; *Lee v. Judgment.*
Henley, 1 Vern. 37; *Thompson v. Attfeild*, *ib.* 40; *Street, J.*
Colman v. Sarrell, 1 Ves. Jr. at p. 54; *Phillipson v. Kerry*,
32 Beav. 628; *Broun v. Kennedy*, 33 Beav. 133; *Lister v.*
Hodgson, L. R. 4 Eq. 30.

This view of the case does not appear to have been brought to the notice of the learned trial Judge, as it is not dealt with by him in his judgment.

None of the cases referred to by counsel will be found to infringe in any degree upon this rule.

It is unnecessary, therefore, that we should discuss the other questions raised by the notice of motion.

There should be judgment for the defendant, in my opinion, with costs of the action and of the motion.

[QUEEN'S BENCH DIVISION.]

BRISTOL AND WEST OF ENGLAND LAND, MORTGAGE, AND
INVESTMENT COMPANY

v.

TAYLOR.

Principal and Surety—Novation—Extension of Time—Increase in Rate of Interest—Reservation of Rights against Surety—Discharge of Surety.

A new agreement between the debtor and creditor extending the time for payment of the debt and increasing the rate of interest, without the consent of the surety, is a material alteration of the original contract, and releases the surety.

And a provision in such agreement reserving the rights of the creditor against the surety, though effectual as regards the extension of time, is idle as regards the stipulation for an increased rate of interest, and, notwithstanding such reservation, the surety is discharged.

Statement.

ON 24th December, 1886, a mortgage was made by G. W. Badgerow to John Taylor of certain lands in the city of Toronto to secure payment of \$12,000, with interest at 6 per cent. per annum, payable as follows: the principal on 24th December, 1891, and the interest in the meantime half yearly at 6 per cent. per annum on 24th June and 24th December in each year until the principal money should be paid and satisfied. The mortgage deed contained, amongst other stipulations, one in the following words: "Provided further, that should the said mortgagor, his heirs, executors, administrators, or assigns, lay out the said lands, or any portion thereof, according to a plan of subdivision to be made thereof, and should make sale of any lot or lots according to such plan, then the said mortgagee, his executors, administrators, and assigns, shall, at the request of the said mortgagor, his heirs, executors, administrators, or assigns, release such lot or portions so sold from these presents on being paid a sum which shall be equal to the rate of \$1,440 per acre for the lots or portions so being sold and required to be released according to the measurement thereof, *all interest overdue having been first*

paid." The mortgage also contained a power of sale, but only on default of payment for two months, and upon fifteen days' notice. Statement.

On the 16th January, 1890, the defendant John Taylor, the mortgagee, assigned the mortgage to the plaintiffs, and in the assignment, after reciting the mortgage, covenanted with the plaintiffs that the sum of \$11,000, with interest from 24th December, 1889, was then unpaid and owing upon it, and that if and so often as any default should be made by the mortgagor, his heirs, executors, administrators, or assigns, in the payment of the said mortgage moneys, whether of principal or interest, or any part thereof, he would forthwith pay and make good the same to the plaintiffs.

The principal money of \$11,000 remaining unpaid at maturity, an agreement was entered into on 14th January, 1892, without the consent or knowledge of the defendant, between the mortgagor Badgerow and the plaintiffs, under seal, wherein after reciting the mortgage, and that the principal sum of \$11,000 had become due to the company, it was agreed that the payment thereof should be postponed for five years from 24th December, 1891, and that from that date the principal should bear interest at seven per cent. payable on the days mentioned in the mortgage, until it should be fully paid. It was further provided as follows: "And this agreement shall from the date hereof, and without prejudice to the present state of the mortgage account, be read and construed along with the said mortgage, and be treated as a part thereof; and for such purpose, and so far as may be necessary to effectuate the intent of these presents, the said mortgage shall be regarded as being hereby amended; and the said mortgage as so amended, together with all the covenants, powers, and provisos therein contained, shall be and continue to be in full force, virtue, and effect. And it is further agreed that nothing herein contained shall in any way affect the right of the said company as against any surety for the said mortgage debt or any part thereof."

Statement.

On 27th September, 1892, the plaintiffs released from the mortgage a small portion of the land in question, being sub-lot No. 1 upon a sub-division of the land covered by the mortgage made by the mortgagor. The plaintiffs, before executing this release, received from the administratrix of the mortgagor, a sum equal to the value of the parcel released, calculated at \$1,440 an acre. At the time this release was executed, the interest due 24th June, 1892, under the agreement of 14th January, 1892, was in arrear and unpaid. No notice had been given under the power of sale in the mortgage.

On 23rd February, 1893, this action was begun by the plaintiffs against the defendant to recover from him the principal sum of \$11,000, less \$225.51 credited on account on 10th September, 1892, being the amount paid them upon the release of sub-lot number one, with interest at six per cent. on the balance of \$10,774.49, from 10th September, 1892, and alleging default in payment of the interest "due 24th December, 1892, under the terms of the said mortgage."

The defendant in his defence set up that the agreement of 14th January, 1892, had effected an alteration in the terms of the contract between the principal debtor and the creditor sufficient to have the effect of discharging him; that the release of a portion of the mortgaged premises contrary to the terms of the mortgage, and without the defendant's assent, had also the effect of discharging him; and that when he entered into his covenant with the plaintiffs, it was upon the express agreement on their part that if default were made by the mortgagor, the plaintiffs would forthwith notify the defendant and proceed with reasonable diligence to realize the arrears from the mortgagor, and that these promises had not been kept.

The action was tried before ROBERTSON, J., without a jury, at the Toronto Sittings, on 14th June, 1893.

September 5, 1893. ROBERTSON, J.—(after setting out Judgment.
the facts):—

Robertson, J.

The defence relied on at the trial was, first, that the defendant entered into the covenant sued on on the express agreement on the part of the plaintiffs that if default were made by the mortgagor in payment of either principal or interest, the plaintiffs would forthwith notify the defendant and proceed with reasonable diligence to realize the moneys so in arrear from the mortgagor; second, that the mortgagor having made default in payment of the principal money due on the 24th December, 1891, the plaintiffs, without the consent, privity, or knowledge of the defendant, who was a surety, afterwards, on the 14th January, 1892, by an instrument under their corporate seal, postponed for five years from the 24th December, 1891, the payment of the principal money, \$11,000, at seven per cent. per annum, payable on the days mentioned in the said mortgage, and therefore the defendant was discharged from his liability as such surety; third, that after default had been made in payment of the principal money and interest secured by the mortgage, the plaintiffs, without the knowledge or consent of the defendant, released and discharged from the said mortgage lot number one, being part of the lands described in the said mortgage and held by the plaintiffs as security for the moneys due by Badgerow to the plaintiffs.

Taking these several objections in the order in which they are stated, I find that in regard to the first the evidence, or rather testimony, offered by the defendant in support of the alleged agreement has utterly failed to establish such an agreement. The testimony consisted of a verbal statement made by the plaintiffs' manager—according to the testimony of the defendant—and does not appear in the written agreement; the covenant is silent as to it, and the only testimony offered in support of it was the unsupported and contradicted statement of the defendant, which was to the effect that he, the defendant, said at the time he handed to the manager of the plaintiffs the assignment

Judgment. and covenant, "You must give me notice in case default Robertson, J. is made;" to which the manager replied, "Yes." This was not receivable as evidence, but it is the most likely thing possible, for the reason that, until default was made, the defendant was not to be called upon to pay; that the plaintiffs would notify him of the default, there is no doubt; but having failed to notify him affords no defence.

Then as to the second objection above mentioned, the plaintiffs say: True it is that the mortgagor was in default in payment of the principal money at the time the payment of such principal was postponed, but in and by the instrument by which the plaintiffs postponed the payment they expressly agreed with the mortgagor that nothing therein contained should in any way affect the rights of the plaintiffs as against any surety for the said mortgage debt, or any part thereof.

Now, if that is not a good answer, the defendant should have demurred, but he takes issue, or at least does not answer; so there is an issue of fact to try. The evidence establishes beyond doubt that such reservation was made; the agreement postponing the payment contains such in express terms. This being the fact, the issue is in favour of the plaintiffs; but, apart from that, I am of opinion that the plaintiffs having so reserved their rights against the surety, he is not discharged; the giving time to the principal debtor by the creditor would not prevent the surety proceeding against him, if he, the surety, chose to avail himself of the right to pay the plaintiffs' claim, and then proceed against the principal debtor; there was no agreement on the part of the surety that he would extend the time; it was a matter entirely between the creditor and the principal debtor; so that, had the surety been so minded, he could pay off the creditor, take a reassignment of the mortgage, and proceed at once against the mortgagor; and the fact that at the time of the postponement the mortgagor was in default would, in my judgment, make no difference, although Mr. Maclaren urged that that circumstance took the case out of the authorities in favour of the

general rule that the reservation of rights does not discharge the surety.

Judgment.
Robertson, J.

The surety will not be discharged if the creditor, on giving further time to the principal debtor, reserve his right to proceed against the surety; "for, when the right is reserved, the principal debtor cannot say it is inconsistent with giving him time that the creditor should be at liberty to proceed against the sureties, and that they should turn round upon the principal debtor, notwithstanding the time so given him; for he was a party to the agreement by which that right was reserved to the creditor, and the question whether or not the surety is informed of the arrangement is wholly immaterial:" *Webb v. Hewitt*, 3 K. & J., at p. 442; *Boulton v. Stubbins*, 18 Ves. at p. 26.

There is, therefore, no doubt whatever, in my judgment, that the surety in this case is not discharged; the facts in this last case are parallel with the facts of the case now before me.

Then, as to the third objection. The mortgage provides that in case of the sale of any lot or lots, according to a then contemplated plan, by the mortgagor, the mortgagee, his heirs, executors, administrators, and assigns, "shall, at the request of the mortgagor, his heirs or assigns, release such lot or portions so sold from these presents, on being paid a sum which shall be equal to the rate of \$1,440 per acre for the lots, etc., so being sold and required to be released according to the measurement thereof, all interest overdue having been first paid." This proviso was invoked by one Compton, who was a purchaser of lot number one on said plan, and the fact of the principal money having become due on the preceding 24th December, although postponement was made of the payment for five years, cannot make any difference, in my judgment; if the mortgagee (this defendant) had held the mortgage at the time when this lot number one was sold, viz., 22nd September, 1892, he would have been powerless to resist it—in fact, if he had previously taken proceedings to foreclose, the purchaser of the lot could have insisted upon having his par-

Judgment. ticular lot released from the effects of the mortgage, on
 Robertson, J. tendering the amount the lot would come to, calculated on
 the value of \$1,440 per acre. No authority was cited in
 support of the defendant's contention, and I cannot see on
 principle why such a contention should prevail.

On the whole case I think the plaintiffs are entitled to
 recover—and with costs.

I have referred to the following cases:—*Pledge v. Buss*,
Johns. (Eng. Ch.) 663; *Polak v. Everett*, 1 Q. B. D. 669; *Holme*
v. Brunskill, 3 Q. B. D. 495; *Bolton v. Salmon*, [1891] 2
 Ch. 48; *Wheatley v. Bastow*, 7 DeG. M. & G. 261; *Bolton*
v. Buckenham, [1891] 1 Q. B. 278; *Gray v. Coughlin*, 18
 S. C. R. at p. 567; *Duncan v. North and South Wales Bank*,
 6 App. Cas. 1; *Forbes v. Jackson*, 19 Ch. D. 615; *Owen v.*
Homan, 4 H. L. C. 997; *Jenkins v. Robertson*, 2 Drew.
 351; *Cross v. Sprigg*, 2 Macn. & G. 113; *Rees v. Berrington*,
 2 Ves. Jr. at p. 543; *Prendergast v. Devey*, 6 Madd.
 124; *Bell v. Manning*, 11 Gr. 142; *Wylke v. Rogers*, 1 DeG.
 M. & G. 408; *Kearsley v. Cole*, 16 M. & W. 128.

At the Michaelmas Sittings of the Divisional Court,
 1893, the defendant moved to set aside this judgment and
 to enter judgment for him, upon the grounds that by the
 agreement of 14th January, 1892, the plaintiffs had mate-
 rially altered the terms of the original contract; and had
 released a portion of the mortgage security contrary to
 the terms of the mortgage; and that upon both grounds
 the defendant was discharged.

The motion was argued on the 24th November, 1893,
 before ARMOUR, C. J., and STREET, J.

J. J. Muclaren, Q. C., for the defendant. After the
 maturity of the mortgage the plaintiffs entered into a new
 agreement with Badgerow with different terms and an in-
 creased rate of interest. This was a material variation of
 the original contract. The defendant was a surety, and he
 is discharged as such: De Colyar on Guaranties, 2nd ed.,
 p. 355; *Sanderson v. Aston*, L. R. 8 Ex. 73, 76. The
 plaintiffs also, on the 27th September, 1892, interest

being then overdue, released a portion of the security. On that ground also they are discharged: *Pledge v. Buss*, Johns. (Eng. Ch.) 663; *Polak v. Everett*, 1 Q. B. D. 669; *Holme v. Brunskill*, 3 Q. B. D. 395; *Gray v. Coughlin*, 18 S. C. R. at p. 567. The surety is entitled to all the securities, even if he is not aware of their existence: *Duncan v. North and South Wales Bank*, 6 App. Cas. 1; *Forbes v. Jackson*, 19 Ch. D. 615; *Bolton v. Salmon*, [1891] 2 Ch. 48. As to the effect of a novation, see *Commercial Bank of Tasmania v. Jones*, [1893] A. C. 313.

Shepley, Q. C., on the same side. As to the reservation of rights against the surety, the doctrine is that the surety can, on paying the debt, enforce against the principal debtor all the remedies which the creditor has. But here the reservation must refer only to the covenant; the creditor could not give the surety the benefit of the power of sale. I refer to *Burnham v. Galt*, 16 Gr. 417; *Bank of Upper Canada v. Covert*, 5 O. S. 541; *Canada Agricultural Ins. Co. v. Watt*, 30 C. P. 350. The surety is discharged by the addition of interest: *Brandt on Suretyship*, 2nd ed., sec. 379; and by the departure from the contract; *ib.*, sec. 397.

Lash, Q. C., for the plaintiffs. The sale and release of a portion of the land was in September, 1892. The interest due in the month of June previous had been paid, and there was no interest again due till the following December. Under these circumstances the surety was not discharged by the release, or at most was only discharged *pro tanto*: *Taylor v. Bank of New South Wales*, 11 App. Cas. 596. Upon the other point, I rely on the cases referred to by the trial Judge.

December 29, 1893. The judgment of the Court was delivered by

STREET, J.—(after setting out the facts as above):—

I agree with my learned brother Robertson that the collateral contract set up by the defendant obliging the plaintiffs to notify him of the mortgagor's default, and to

Judgment. proceed in the first place to realize their claim from the
Street, J. mortgagor, was not made out. I regret that I am unable to agree in his conclusions upon the other matters of defence.

The covenant sued on is contained in an assignment by the defendant to the plaintiffs of a mortgage from Badgerow to the defendant, which is recited in the assignment. The precise terms of the mortgage must be taken to be imported into the defendant's covenant. He says in effect to the plaintiffs: "You have become the holders by transfer from me of a debt now owing to you by the mortgagor, bearing interest at six per cent., payable upon certain specified days, and secured upon certain land: if the mortgagor does not pay the debt as he has agreed to do, I will pay it."

After the maturity of the debt the plaintiffs and the mortgagor agreed that the mortgage should be read as if the rate of interest mentioned in it were seven per cent. instead of six per cent. from the time the principal sum matured, and as if the date originally mentioned for payment of the principal had been 24th December, 1896, instead of 24th December, 1891.

In *Holme v. Brunskill*, 3 Q. B. D. 495, at p. 505, Cotton, L. J., delivering the judgment of the majority of the Court, thus stated the law: "That if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court will not, in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question, whether the surety is discharged or not, to be determined by the findings of a jury as to the materiality of the alteration or on the question whether it is to the prejudice of the surety, but will hold that in such a case

the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged."

Judgment.
Street, J.

Brett, L. J., the dissenting Judge, expressed his view as follows (p. 508): "The proposition of law as to suretyship to which I assent is this, if there is a material alteration of the relation in a contract, the observance of which is necessary, and if a man makes himself surety by an instrument reciting the principal relation or contract, in such specific terms as to make the observance of specific terms the condition of his liability, then any alteration is material; but where the surety makes himself responsible in general terms for the observance of certain relations between parties in a certain contract between two parties, he is not released by an immaterial alteration in that relation or contract."

I have quoted this judgment of Brett, L. J., because it appears to me that, even in his view of the law, not only the alteration in the time of payment, but also the alteration in the rate of interest, must be treated as material. Under the judgment of the majority of the Court there can be no doubt that both variations are material.

The plaintiffs seek to avoid the consequences as between themselves and the surety by referring to the clause in the agreement of January, 1892, which declares that nothing therein "contained shall in any way affect the right of the said company (the plaintiffs) as against any surety for the said mortgage debt, or any part thereof."

Clauses to the same effect have by a somewhat round-about construction been held to mean that notwithstanding the agreement for an extension of time for the payment of the debt between the creditor and the debtor, the surety paying the debt at any time may sue the debtor at once, without waiting for the expiration of the extended time. By the effect of this construction, the result is arrived at that there is no variation from the original contract so far as the surety's rights are concerned.

The reservation of rights against the surety has, how-

Judgment.

Street, J.

ever, so far as I can find, never been held effectual to avoid the consequences of any other alteration in the terms of the contract than an extension of the time for payment ; and there is, it appears to me, a very plain and manifest explanation of the fact. Where the alteration in the contract consists in an extension of time for payment and nothing more, it is easy to interpret the extension and the reservation of rights against the surety into a contract by the creditor that so long as the surety does not exercise his right of paying the debt and taking the creditor's place, but no longer, the extension shall be binding ; but what possible meaning can be ascribed to a contract by the debtor with the creditor to pay him an increased rate of interest, coupled with a reservation of the creditor's rights against the surety ? If it is to be taken to mean that as between the debtor and the creditor, the increased rate of interest is to be paid upon the debt only until the surety pays the debt, then the surety is discharged, because the contract he guaranteed has been materially altered ; he never agreed to guarantee the payment of a debt bearing interest at seven per cent., and the condition of the surety has been altered for the worse by the additional rate. It can hardly be taken to mean that it is to have no effect whatever in case it is held to be such a stipulation as will affect the rights of the creditor against the surety, for that would be introducing into the agreement elements of uncertainty which we cannot assume to have been intended by the parties to it. As was said by Lord Esher, M. R., in *Bolton v. Buckenham*, [1891] 1 Q. B. 278, at p. 281 : " I do not think a person can in a deed reserve rights which, by other terms of the same deed, he has necessarily given up. The words of reservation are in such case idle words."

I think we must come to the conclusion here that there has been a material alteration in the contract between the debtor and the creditor in the stipulation for an increased rate of interest, as well as in the extension of time, both being without the consent of the surety ; that the words reserving the creditor's rights against the surety, however

effectual they may be in so far as the extension of time is concerned, are mere "idle words" in so far as any effect upon the stipulation for an increased rate of interest is concerned, and that the defendant is, therefore, discharged.

Judgment.
Street, J.

This being the case, it is unnecessary to consider the effect of the discharge by the plaintiffs of a part of the mortgaged premises.

The motion must be allowed, and judgment entered for the defendant with the costs of the action and of this motion.

[CHANCERY DIVISION.]

NORRIS V. THE CORPORATION OF THE CITY OF TORONTO.

Assessment and Taxes—Municipal Corporations—Levy on Goods of Stranger—55 Vict. ch. 48, sec. 124 (O.).

Premises in a city municipality were occupied, as tenants, by a firm of auctioneers, who, however, were not assessed in respect to them. Goods of the plaintiff left with the auctioneers to be sold by auction, were distrained by the defendants for the taxes payable upon the premises for the current year:—

Held, that the distress was valid under sec. 124, of the Consolidated Assessment Act, 1892, 55 Vict. ch. 48 (O.).

THIS was a motion to continue an injunction to restrain the defendant corporation and the collector of taxes and bailiff from selling certain goods which had been seized for taxes, and by consent of parties was turned into a motion for judgment.

Statement.

The motion was argued on November 28th, 1893, before FERGUSON, J., who fully sets out the facts in his judgment.

W. C. Watt, for the plaintiff. *Oliver Coate & Co.* are not on the assessment roll; the persons assessed are *Dickson & Townsend* as occupants, and *John Catto* as owner. 55 Vict. ch. 48, sec. 124(O.), is the section involved. The city licensed the auctioneers to sell goods, and they are estopped from

Argument. seizing the goods for this reason. Besides, we claim the benefit of the exemption in section 28 of the Landlord and Tenant Act, R. S. O. ch. 143, subject to which the power given by 55 Vict. ch. 48, sec. 124, is expressly made. [FERGUSON, J.: section 28 applies only to rent. I cannot convert it so as to include taxes as well as rent.] For use in 55 Vict. ch. 48, sec. 124, taxes as well as rent must be read into sec. 28 of the R. S. O. ch. 143.

Mackay, on same side.

Caswell, for the defendants. The goods could never have been seized by the landlord: *Simpson v. Hartopp*, Smith's L. C., 8th ed., vol. 1, p. 450. Only section 27 of the Landlord and Tenant Act, R. S. O. ch. 143, can be made to apply to section 124. Section 28 cannot be brought in. Sections 128, 129 and 130, shew that the intention was to sell goods of others than the person who ought to pay. Section 137 charges the taxes on the land. See also *Carson v. Veitch*, 9 O. R. 706.

December 6th, 1893. FERGUSON, J.:—

The motion is to continue an injunction restraining the defendants from selling certain goods seized as a distress for taxes. The goods were, no doubt, the property of the plaintiff and were left by him on the premises occupied by Messrs. Oliver Coate & Co., auctioneers, on King street, in the city of Toronto, to be by them as such auctioneers sold for the plaintiff. This was simply in the ordinary course of business.

These premises had before been occupied by Messrs. Dickson & Townsend, who were also auctioneers. Their occupation of the premises continued, as I understand, till after the time during last year when the assessment respecting taxes for the present year took place. The assessment was made against Dickson & Townsend as occupants, and John Catto as owner. Dickson & Townsend had occupied the premises and carried on their business as auctioneers there for about four years, but before

the time for the collection of the taxes for the present year arrived they left the premises, and Oliver Coate & Co., came in, and they have since hitherto been the occupants and carrying on their business as auctioneers. I need scarcely add, that for a long series of years prior to the occupation of these premises by Dickson & Townsend above mentioned, the premises had been occupied by Oliver Coate & Co. as auctioneers. Judgment.
Ferguson, J.

The distress complained of, and in question here, is in respect of the taxes upon these premises for the present year a sum of \$752.99. This distress embraces goods of other persons left upon the premises to be sold by Oliver Coate & Co., as auctioneers, in the same way as the plaintiff's were left. The plaintiff's goods are said to be of the value of about \$380.00.

The seizure was made professedly under the provisions of the Act 55 Vict. ch. 48, sec. 124. This Act is known as "The Consolidated Assessment Act, 1892."

Such is an outline of the facts as stated at the bar. No papers seem to have been left with me for the purposes of this judgment.

Counsel agreed in saying that the sole question here is, whether or not the goods of the plaintiff so left with Oliver Coate & Co. as auctioneers, to be by them sold and disposed of in the ordinary course of their business as auctioneers can be legally distrained upon for taxes due and payable in respect of the premises on which the goods were found; the said premises being in the possession of occupants other than the person assessed for or in respect of such taxes as owner or occupant? This is the way in which counsel stated their question. The form of words employed may not possess entire grammatical accuracy, but I do not see that it leaves any room for misconception.

It was agreed, with my concurrence, that the motion should be changed into a motion for judgment in the action, there being but the one question between the parties, and no dispute or difference as to the facts.

Judgment.

Section 124, of ch. 48, 55 Vict., is as follows :

Ferguson, J.

“ Subject to the provisions of section 53 of this Act, in case a person neglects to pay his taxes for fourteen days after such demand or after notice served pursuant to such by-law as aforesaid, or in the case of cities and towns after such demand or notice as aforesaid, the collector may, by himself or by his agent, subject to the exemptions provided for by sections 27 and 28 of the Act respecting the law of Landlord and Tenant, levy the same with costs by distress of the goods and chattels of the person who ought to pay the same, or of any goods or chattels in his possession wherever the same may be found within the county in which the local municipality lies, or of any goods or chattels found on the premises, the property of or in the possession of, any other occupant of the premises, and the costs chargeable shall be those payable to bailiffs under the Division Courts Act.”

No question was raised as to any of the preliminary matters mentioned in this section. These are to be considered as if all had happened or been performed. It was conceded, and is plain, that section 53, mentioned in the first line of this section 124, has no bearing upon the present case.

The exemption in respect of distress for taxes mentioned in section 27 of the Act respecting the law of Landlord and Tenant, which is ch. 143, R. S. O. 1887, cannot aid the plaintiff in his contention here. It seems to be confined to such goods and chattels as would be exempt from seizure under an execution, and, as was conceded, rightly I think, can have no application in the present case.

It seems, though this may not be material here, that these goods were not liable at common law to be distrained upon for rent in arrear. Woodfall's Landlord and Tenant, 14th ed., p. 471 ; *Simpson v. Hartopp*, Smith's L. C., 8th ed., vol. 1, p. 450, and notes. For their protection against or exemption from such a distress, the provisions of the section 28 were not required.

The goods and chattels in question were found on the

premises and in the possession of an occupant of the premises other than the occupant who was assessed in respect of these taxes clearly within the meaning of the words of the latter part of section 124, under the provisions of which this distress was professedly made. Judgment.
Ferguson, J.

The motion was very ingeniously argued for the plaintiff, yet counsel was forced to concede that unless he could shew that by force of the fact that section 28 of R. S. O. ch. 143, is mentioned in the way in which it is in the section 124, under which the distress was professedly made, taxes must be read into section 28 aforesaid, as well as rent, he could not succeed.

One does not find in this section 28 any reference to or provision respecting taxes, exemption from distress for taxes or the mode of collecting taxes. Nothing is said or provided for in that section as to taxes at all.

The section 124 under which this distress was made does not provide for or authorize the adoption in cases of distress for taxes of the principles that may be said to be found in section 28 above mentioned respecting distress for rent. The language of section 124 is "subject to the exemption provided for." This seems to me to leave nothing to analogy, nor any room for the adoption of a principle or rule by analogy however commendable such a course might seem in a particular given case. Where the language of the Act is precise and unambiguous, but at the same time incapable of reasonable meaning, and the Act is consequently inoperative, the Court is not at liberty to give the words on mere conjectural grounds, a meaning that does not belong to them, and the only thing one can do, as it seems to me, is to examine and see if there is any exemption in respect of taxes "provided for" in the section 28 aforesaid, and if such an exemption so provided for is found in the section, then employ it in pointing out the effect of the section 124 as applied to the case in hand. I have, as I have already indicated, failed to find any such exemption "provided for" in section 28 aforesaid, and I cannot, therefore, employ one in the present case. "The

Judgment. business of an interpreter is not to improve the statute,
Ferguson, J. but to expound it. The question for him is not what the Legislature meant, but what its language means": Maxwell, on the Interpretation of Statutes, 2nd ed., p. 7, and cases there referred to.

It was urged, and with much force, that the whole of the section 124 must be read, and that one is not at liberty to cast out "and 28" and the final letter "s" in the word sections which occur in the seventh line of the section.

All that I can say in this regard is, that I am unable to find any practical meaning that can be given to these, and in my opinion, I am driven to read the section as if it did not contain them.

I am, for the reasons I have endeavoured to give of the opinion that notwithstanding anything that has been shewn or urged to the contrary, the distress in question was legally made, and that the motion to continue the injunction had it remained in that form, would have been rightly dismissed or refused, but as it was converted into a motion for judgment, there must be judgment dismissing the action.

Counsel for the defendants said that his clients would not ask any costs.

Action dismissed without costs.

A. H. F. L.

[CHANCERY DIVISION.]

DYER V. THE MUNICIPAL CORPORATION OF THE TOWN
OF TRENTON.

Assessment and Taxes—Special Provisions for Taking Assessment in Autumn—Levy in same Year—55 Vict. ch. 48, sec. 52 (O.)

The “special provisions” in reference to municipal assessment, contained in sec. 52, of the Consolidated Assessment Act, 1892, 55 Vict. ch. 48 (O.), do not permit such assessment to be levied for the current year, but the assessment so taken at the end of the year may be adopted by the council of the following year, as the assessment on which the rate of taxation for such following year may be levied.

THIS was an application by a ratepayer of the town of Statement.
of Trenton suing on his own behalf to continue to the trial an injunction to restrain the defendants from levying certain taxes. The defendants had not made any assessment during the spring of 1893, but purporting to act under section 52, of the Consolidated Assessment Act, 55 Vict. ch. 48 (O.), they passed a by-law for taking an assessment between July 1st, and September 30th, and took an assessment accordingly as provided by that section, and in December were proceeding to levy a rate of taxation based upon the said assessment for the purpose of raising the necessary taxes for the year 1893. This injunction was then applied for to restrain them, upon the ground that the provisions of section 52, could not be utilized for the purpose of levying a rate in the same year in which the said assessment was made.

The motion was argued on December 27th, A.D. 1893.

O'Rourke, for the plaintiff.

Marsh, Q. C., and *O'Leary*, for the defendants.

December 27th, 1893. BOYD, C.:—

This application turns on the meaning and effect of section 52 of the Consolidated Assessment Act, 55 Vict. ch. 48

Judgment. (O.), a provision which was first introduced in 1876 (39 Vict.
Boyd, C. ch. 33, sec. 1). It is argued that the assessment made under this special provision is available as the assessment of the year 1893, in which it was made, and the taxes may be levied in respect thereof in 1894, as for the taxes of the year 1893, and on the other hand it is said that the "special provision" (as it is called in the heading of the statute) is of a prospective character merely with a view to its adoption by the council of the next year.

My mind has fluctuated a good deal, and the language of the enactment is by no means clear or self-expositive. But I incline to think that the matter is not so explicit as to warrant the levy of the current year's taxation under the by-law passed for regulating the periods for taking the assessment, etc. The scope of the section is limited to the case of an assessment merely, and what is said is that this assessment so taken at the end of the year may be adopted by the council of the following year as the assessment on which the rate of taxation for said following year may be levied, and in the year following the passing of the by-law [*quære*, the by-law for adoption?], the council may adopt the assessment of the preceding year as the basis of the assessment of that year. This may provide for a second and third year after the first when the assessment was concluded. But whether or not the function of the assessment is defined only with reference to future years, and it is not that the rate therein may also be levied for the current year. The section is barren of express decision, but municipal action as manifested in the only reported cases I find, favours the view advocated by the plaintiff: I refer to *Regina ex parte Clancy v. McIntosh*, 46 U. C. R. pp. 101 and 105, and *Re Dwyer and The Town of Port Arthur*, 21 O. R. 175 and 178. As at present advised I think the injunction should be continued.

If the result is to leave the municipality without taxes for 1893, the only solution appears to be legislative interference.

[CHANCERY DIVISION.]

OSTROM ET AL. V. ALFORD ET AL.

Will—Construction—Bequest to Trustees of Church—Mixed Fund—Application of—Directions.

A testator by his will bequeathed a sum of money to the trustees of a Church "to be * * used in the payment of any indebtedness on said Church, and for such other purposes as they may deem wise." At the time the will took effect there was no debt on the Church :—

Held, that the reference in the will meant outlay in connection with the Church such as repair and maintenance or any obligation incurred for which the land was not liable, and that the bequest was valid.

Bunting v. Marriott, 19 Beav. 163, followed.

The will directed the bequest to be paid out of a mixed fund derived from the sale of land and personalty :—

Held, as far as the real estate was concerned that the gift failed.

Directions as to the application of the fund.

THIS was an action brought by George M. Ostrom and William Kelly, as executors of the last will and testament of Henry Alford, deceased, against John Alford and others interested in his estate, for the construction of his will as to a certain devise to the trustees of a Methodist Church. Statement.

The material parts of the will, after a direction to pay debts, were as follows :—

"I give, devise and bequeath unto Elizabeth M. Corbett * * the sum of \$200.

"I give, devise and bequeath unto my brother, Joseph Alford, * * the sum of \$100.

"I give, devise and bequeath unto my niece, Mary Jane Copeland, * * the sum of \$100.

"I give, devise and bequeath unto the trustees of the Canada Methodist Church, in connection with the Wesley Church, on the front of the township of Sidney, in the county of Hastings, the sum of \$500, to be by the said trustees and their successors used in the payment off of any indebtedness on said church, and for such other purposes as they may deem wise, but I direct that the above-mentioned amounts and legacies shall not be paid by my executors, hereinafter named, to the several persons and trustees, until after the sale of my farm, as hereinafter directed.

Statement.

"I give, devise and bequeath unto Maria Wiggins, my niece, * * the sum of \$400, to be paid to her by my executors as soon as conveniently may be after my decease.

"I give, devise and bequeath unto my wife, Margaret Alford, after the payment of all my just debts, funeral and testamentary expenses, and legacy to Maria Wiggins, and for the monument aforesaid, all the rest and residue of my personal and real estate of which I may die possessed of, for and during her natural life.

"I direct that my executors, hereinafter named, shall, after the death of my said wife, sell off all of my personal property, and also all of the real estate, including my farm I now reside on, and being * * * and that they shall, after the payment of all of the above mentioned legacies as mentioned to be paid after the sale of my farm, and after the payment of all charges and expenses, divide the moneys arising therefrom as follows: To be paid to Maria Wiggins the further sum of \$500; and I direct my executors to divide the balance equally between the said Elizabeth M. Corbett and my nephews, John Alford and Joseph Alford, * * and to Eliza Alford."

The widow of the testator subsequently died, and the executors sold the farm and realized the estate,—from personalty, \$1,592.44, and from realty, \$1,795, and, after payment of debts and charges, had on hand a balance of \$1,992.36 to pay the legacies, amounting to \$1,400. Two of the residuary devisees, the nephews, John Alford and Joseph Alford, disputed the validity of the bequest to the trustees of the Methodist Church, on the ground that it came within the provisions of the Statute of Mortmain.

The action was tried at Belleville, on October 24th, 1893, before BOYD, C.

E. G. Porter, for the plaintiffs. The legacy is quite valid. The amount realized from personalty was \$1,592.44. The executors' accounts shew \$1,149.80 properly paid out.

Even if all that is charged against the proceeds of the personalty, there would be \$442.55 on hand available. The executors desire to follow the instructions of the Court. Argument.

W. B. Northrup, for the residuary legatees. The money is to be used for the payment of a debt on a church. That relates to church property. Even if it did not, the evidence here shews the debt had been paid off in 1887, and so none existed to be paid off: *Corbyn v. French*, 4 Ves. at p. 431; *Smith v. The Methodist Church*, 16 O. R. 199. Under the words "for such other purposes," used in the bequest, the money might be applied to charitable purposes. It could not be invested in land: *Murray v. Mulloy*, 10 O. R. 46; *In re Cox v. Davies*, 7 Ch. D. 204. If the bequest is not confined to charitable purposes, then it is void for uncertainty; *Jarman on Wills*, 5th ed., 174; *Vezey v. Jamson*, 1 Sim. & Stu. 69; *Kendall v. Granger*, 5 Beav. at p. 303. As to the fund out of which it is payable, see *Becher v. Hoare*, 8 O. R. at p. 336. As to division of the proceeds of the real and personal estate; *Jarman on Wills*, 5th ed., 196. It cannot be paid out of the personalty without marshalling as against us; *Labatt v. Campbell*, 7 O. R. 250; *Tyrrell v. Senior*, 20 A. R. 156.

F. S. Wallbridge, for the trustees. The legacy to the trustees is perfectly valid, and it may be applied under the words in the will to any lawful purpose for the benefit of the church not connected with land: *Edwards v. Smith*, 25 Gr. 159; *Williams v. Roy*, 9 O. R. 534; *Butland v. Gillespie*, 16 O. R. 486; *Anderson v. Dougall*, 13 Gr. 164; *Anderson v. Kilborn*, 13 Gr. 219.

Northrup, in reply, referred to *Jarman on Wills*, 5th ed., 197 and 198; *Wilkinson v. Barber*, L. R. 14 Eq. 96.

October 27th, 1893. BOYD, C.:—

A bequest of money for the repair and improvement of buildings appropriated to charity is valid, as no additional land is brought into Mortmain. But if the bequest is to remove an existing incumbrance on land in Mortmain,

Judgment. then by considering this as appropriating to charity a new
Boyd, C. interest in land, it is anomalously held a void gift.

If, however, the debt to be removed is not a lien on the land, the obnoxious reason disappears and the bequest is good.

Bunting v. Marriott, 19 Beav. 163, is in favour of the defendants the trustees. That was a bequest to the trustees of a chapel "towards the reduction of their debt on that chapel," and it was held payable to them though the debt on the chapel had been paid off long before, and the only debt since incurred was owing by the trustees personally.

In this case the will provides for the payment of \$500 to the trustees of the Wesley Church on the front of the township of Sidney, "to be used in the payment off of any indebtedness on said church, and for such other purposes as they may deem wise."

It was found that no debt was on the church in this case, it having been paid off some years ago. The reference in the will implies for such other purposes in connection with the particular church as may seem wise to the trustees. That may and would, appropriately to the context, mean outlay in connection with the church: such as in its repair and maintenance on the present site or any obligation incurred by the trustees with respect to the church for which the land was not liable. I think that the bequest as to personalty is valid and of sufficient certainty to enable the Court to say that the wishes of the testator are to be carried out.

But the will directs this bequest to be paid out of a mixed fund derived from the sale of land and pure personalty.

So far as the real estate is concerned, the gift fails.

The mixed fund in hand must be thus dealt with; payment of costs of the action to all three interests; then payment ratably of the specific legacies to Elizabeth Corbett, Mary Jane Copeland, Joseph Alford, Maria Wiggins and the trustees, subject to this, that so much of the

realty as may be apportioned to the ratable payment of the \$500 fails, and goes over to swell the residue. The method is defined in *Williams v. Kershaw*, 1 Keen 274 note, by Lord Cottenham. Judgment.
Boyd, C.

I thought during the argument that there might be a modified marshalling of the fund as against the residuary legatees where the charitable bequest was particular; but the rule is the other way, as stated by Lord Langdale in *Hobson v. Blackburn*, 1 Keen 273.

G. A. B.

[QUEEN'S BENCH DIVISION.]

TENUTE V. WALSH.

Devolution of Estates Act—R. S. O. ch. 108, sec. 9—54 Vic. ch. 18, sec. 2, (O.)—Powers of Executor—Exchange of Lands—Contract—Specific Performance—Costs.

An executor or administrator cannot, having regard to R. S. O. ch. 108, sec. 9, and 54 Vic. ch. 18, sec. 2, (O.), make the lands of the testator or intestate the subject of speculation or exchange by him in the same manner as if the lands were his own.

The Court refused to decree specific performance of a contract by an executor to exchange lands of his testatrix for other lands, as the purpose of the exchange could not have been the payment of debts or the distribution of the estate, and it was shewn that the beneficiaries objected to the exchange, and it did not appear that the official guardian had been consulted.

Costs withheld from the defendant because he had misled the plaintiff as to his power to make the exchange, and declined to perform his contract on grounds some of which were untenable, and also alleged fraud which he failed to prove.

THIS was an action against an executor to compel specific performance of a contract for the exchange of lands, those which the defendant was to give in exchange being part of the estate of his testatrix. The facts are stated in the judgment. Statement.

The action was tried before FERGUSON, J., at Toronto, on the 2nd November, 1893.

T. W. Howard, for the plaintiff.

A. W. Burk, for the defendant.

Judgment. November 16, 1893. FERGUSON, J. :—

Ferguson, J.

This action is brought against the defendant William Walsh as executor of the last will of the late Catherine Walsh, who, as I understand, was his wife. The action is for the specific performance of an agreement for the exchange of certain lands in the city of Toronto. The lands that Walsh agreed to give in exchange were, as was admitted, lands that had belonged to his wife, and form part of her estate. Her will was not in any way or form put in evidence, and I am not permitted to know or learn its contents so as to see whether or not these lands were devised, and if so, to whom or in what manner. It was admitted that the defendant Walsh is the executor of the will, and but for this admission this fact would not appear in the evidence, though it is so stated in the plaintiff's statement of claim.

The agreement on which the plaintiff relies is in writing, and was entered into through an agent who was authorized by the defendant Walsh. This agreement was signed by the defendant (by his agent) and not as executor. It does not on its face disclose the fact that Walsh was or was acting as an executor, though in the action he is sued distinctly as executor, and not otherwise. The agreement is in this respect just such a one as it would be if Walsh was agreeing to give his own lands in exchange for other lands, and it seems to have been assumed by the parties that an executor upon whom lands devolved under the provisions of the statute might exchange or sell or otherwise dispose of them as freely and in the same manner in all respects as if the lands were his own lands. I do not, however, think that so much can be safely assumed.

The 9th section of ch. 108, R. S. O., is as follows : " Subject as hereinbefore provided, the legal personal representatives from time to time of a deceased person shall have power to dispose of and otherwise deal with all real property vested in them by virtue of the preceding sections of this Act, with all the like incidents, but subject to all

the like rights, equities, and obligations, as if the same were personal property vested in them.”

Judgment.
Ferguson, J.

After the passing of that Act, and before the passing of 54 Vic. ch. 18 (O.), it was held that the personal representative could not, as such representative merely, sell lands that had devolved upon him under the provisions of the statute unless there was need of his doing so for the purpose of paying debts, etc., in the course of administration. See *In re Mallandine*, 10 C. L. T. Occ. N. 226. The attempted exchange in the present case was not in any sense an act done or attempted to be done in the course of administration of the estate.

The second section of the last mentioned Act provides as follows: “Executors and administrators in whom the real estate of a deceased person is vested under the Devolution of Estates Act, 1886, or the 4th section of the Revised Statute respecting the devolution of estates shall be deemed to have as full power to sell and convey such real estate for the purpose, not only of paying debts, but also of distributing or dividing the estate among the parties beneficially entitled thereto, whether there are debts or not, as they have in regard to personal estate; provided always that where infants or lunatics are beneficially entitled to such real estate as heirs or devisees, or where other heirs or devisees do not concur in the sale, and there are no debts, no such sale shall be valid as respects such infants, lunatics, or non-concurring heirs or devisees, unless the sale is made with the approval of the official guardian,” etc.

There cannot be, I think, in the personal representative any greater power to exchange than there is to sell the real estate; and sec. 2 of ch. 18, 54 Vic., above referred to, which is, I think, to be considered an enabling statute, seems to me to indicate the purposes for which the personal representative may sell the lands.

It was not shewn whether or not there are in the present case debts of the testatrix. But it seems clear that the purpose of this exchange could not have been the payment of debts or of making a distribution amongst the persons

Judgment. beneficially entitled, and, besides, it was proved before me
Ferguson, J. in a general way that "the heirs" objected to the exchange being carried into effect, and it did not appear that the official guardian had been consulted.

I am not of the opinion that the personal representative can properly make the lands of the testator or intestate the subject of speculation or exchange by him in the same manner as if the lands were his own; and, if there were no reasons other than those above alluded to, I should be of the opinion that this action for specific performance could not succeed.

I do not see that in taking this view I am going contrary to anything laid down in *Martin v. Magee*, 18 A. R. 384, or *Scott v. Supple*, 23 O. R. 393, or in *Re Wilson*, 20 O. R. 397. In the last mentioned of these cases my brother Falconbridge says, at p. 403: "I do not say how it might be if the administrator, having no other interest, were arbitrarily endeavouring to sell against the wishes of the heirs, and without reason or necessity for selling, such as the existence of debts."

There were, however, other reasons urged which seemed to place additional difficulty in the way of the plaintiff, but I do not deem it necessary to consider these or any of them here.

I think the reasons I have given are sufficient to justify me in saying that the agreement should not be specifically performed in this action.

The plaintiff, however, claimed that, in the event of specific performance being refused, he should be awarded damages for breach of the contract by the defendant, but the evidence as to damages sustained was so vague, and the damages alluded to so remote, that the plaintiff should not, as I think, succeed on this branch of his case, even if there were no other impediment or obstacle in his way to the recovery of damages.

As I have already said, I have not discussed every element of the case, nor do I consider it necessary that I should do so.

I am of the opinion that the action must be dismissed; Judgment.
 but, as the defendant made the agreement professing to Ferguson, J.
 have the power and right to make the exchange of the
 lands, and so far misled the plaintiff, and now declines to
 perform on grounds some of which are plainly untenable
 upon the evidence, and as he has alleged fraud, the fraudulent
 alteration of the document, misrepresentation, etc.,
 which have not been proved, the dismissal of the action
 will be without costs.

Action dismissed without costs.

[COMMON PLEAS DIVISION.]

MCNAMEE V. THE CORPORATION OF THE CITY OF TORONTO.

*Arbitration and Award—Contract—Superintendent of Work named as
 Arbitrator in Case of Dispute—Validity.*

By a contract between plaintiff and a city municipality for additions and improvements to its system of water-works, it was provided that all differences, etc., should be referred to the award, order, arbitrament and final determination of H., the superintendent in charge of the said work :—

Held, that the fact of H. being such superintendent did not disqualify him from acting as arbitrator ; and on the evidence that no cause existed to restrain him from proceeding with the reference.

THIS was an action tried before BOYD, C., at the Spring Statement.
 Chancery Sittings of 1892.

Bain, Q. C., and Jones, for the plaintiff.

Shepley, Q. C., and Biggar, Q. C., for the defendants.

The plaintiff was a contractor, and in answer to an advertisement by the defendants, the corporation of the city of Toronto, for tenders for dredging and laying a flexible conduit water pipe across the Toronto Bay, according to certain plans and specifications, on the 2nd July, 1889,

Statement. sent in a tender therefor, which was accepted, and on the 19th July a contract was entered into. This was varied by a subsequent contract entered into on the 21st December, 1889, by making certain alterations in the previous contract, but in other respects it ratified and confirmed the latter.

By the contracts it was provided that all differences that might arise between the plaintiff and the defendants, the corporation of the city of Toronto, touching the said contracts, should be referred to the award, order, arbitrament, final end and determination of the superintendent in charge of said work, so as the said arbitrator should make and publish his award in writing of and concerning such differences within the space of fifteen days after he should have been requested in writing by either party to decide concerning the matter in difference; and that each of the said parties thereto should obey, perform, observe, fulfil and keep the award of such arbitrator so to be made as aforesaid; and should not nor would do any act, matter, or thing to delay, hinder, or prevent the said arbitrator from making his award; and that the submission and reference might be made a rule of court; and that no action or suit should be commenced by either party until after such award should have been made, and then only for the amount of such award.

After the plaintiff had entered upon the performance of the contracts, differences arose between him and the city, and the superintendent was requested in writing by the defendants, the corporation of the city of Toronto, to make his award concerning the same.

The plaintiff thereupon commenced an action against the city, and William Hamilton, the superintendent, to reform the contract; and he obtained an interim injunction restraining the defendants from proceeding with the said reference.

In dissolving the injunction the learned Chancellor delivered the following judgment:—

May 12th, 1892. BOYD, C. :—

Judgment.

Boyd, C.

Scotch cases go to shew that when the arbiter named is also the engineer of the works, anything which he does or says falling within his ordinary functions as such engineer, does not disqualify him as arbiter. This is held to result as a consequence of the dual character which he occupied: in one relation acting as agent or representative of the proprietors; and in the other, changing his functions to that of a judge who is to hear both sides before he determines the matter in dispute.

The last case is in 1883, *Mackay v. Parochial Board of Barry*, 10 Court of Session Cases, 4th series, 1046, which follows the earlier cases cited therein.

This state of the law is also recognized, though not perhaps so explicitly in England; see the judgment of Grove, J., in *Laidlaw v. Hastings Pier Co.*, reported in the appendix of Jenkins and Raymond's *Architects Legal Handbook*, 3rd ed., p. 250 (decided in 1874).

This probably leads to the following results; that, as to matters which arise during the progress of the work, the contemporaneous direction or certificate of the engineer may be final and conclusive under the usual clause found in this contract. That would cover such matters as extra work, and the measuring and correctness of the plans, etc.; but, as to all matters not so arising, and as to all matters not previously decided, the differences would fall to be dealt with under the arbitration clause. This would lead to the conclusion that things ruled upon finally by him as engineer, are not to be reconsidered by him as arbitrator.

I rather think that is the effect of the present contract, which embodies the specifications and gives this dual character to the superintendent of the water-works, under whom the engineer acts.

I have not to consider the apparent hardship of the case, but the fair meaning of the contract, though I admit the more reasonable way would be to have the engineer a dis-

Judgment. tinct person from the arbitrator; but the tendency of
Boyd, C. building agreements is to make them more stringent on the contractor.

Now, regarding the points which are pleaded with a view to disqualify the superintendent from acting as arbitrator, I do not think any separately, or all combined, are sufficient to get rid of the contract appointing him.

The first is that he furnished estimates of the cost of this work to the corporation, on which the corporation acted in accepting the plaintiff's tender, which was unknown to the plaintiff when he executed the contract.

The evidence is, that Mr. Hamilton thought of the present scheme in 1886 or 1887, and made estimates of its cost, in consequence probably of which the project was taken up seriously in 1889.

Kemp v. Rose, 1 Giff. 258, goes further in this direction, but there the prior estimate was not only made, but it was accompanied by an assurance that the contract should not exceed that amount. No such assurance or understanding was given by Mr. Hamilton. This assurance was of the essence of the decision, as is brought out in the comments of Lord Ardmillan thereon, in *Trowsdale v. North British R. W. Co.*, 2 Court of Session Cases, 3rd series, 1334, which is cited in Hudson on Building Contracts, p. 290, a very mine of information upon this subject.

Next is the statement that Hamilton is responsible for errors in the plans and profiles, whereby much extra work was required to be done.

It is not proved that there are errors in these. It may be that extra work was called for on account of the flanges in the pipes projecting, so that more excavating or dredging was needful, and it may be that a wrong line of commencement was given by one of the sub-engineers to the plaintiff, but these are things expressly within the supervision and control of the superintendent during the progress of the works, and nothing has been shewn to indicate disqualification in this regard and as arbitrator: *Goodyear v. Mayor, etc., of Weymouth*, 1 Har. & Ruth. 68; 35 L. J. N. S. C. P. 12.

The opinion expressed by Mr. Justice Rose in *Farquhar v. City of Hamilton*, 101 Printed Appeal Cases, p. 122,* is directly at variance with appellate decisions in the Scotch Courts, as to which I refer to *Trousdale v. North British R. W. Co.* (1864), 2 Court of Session Cases, 3rd series, 1334, and in appeal, 4 Court of Session Cases, 3rd series, p. 31.

Judgment.
Boyd, C.

The next ground, that the defendant gave incorrect certificates, and admitted it was done under pressure from members of the water-works committee, and that he refused the final certificate for the same reason, are unproved.

It is next alleged that the superintendent is largely responsible for delay in furnishing materials for the works, and that he is likely to be endangered in his office if the plaintiff gets damages for such delay. It is not proved that the superintendent is responsible for any delays, and his relation to the city was known when he was accepted as arbitrator.

In paragraph 38, it is alleged that the defendant has assumed to deduct from the amount admitted to be due to plaintiff, a large sum for penalties on account of the work not being completed within the time.

The fact is, that the certificate which was signed by the superintendent as to the penalties, was sent to him from the secretary of the water-works committee, and has been drawn by the engineer, but this certificate was not perfected or issued. No judgment was exercised in respect of it by the superintendent; it was signed by him formally, and it was not within his functions to sign any such certificate. He had not the contractor before him—did not consider his claims, and is still open to hear and decide in presence of both parties.

I do not think that this act (which may be called of inadvertence), shews that the defendant has prejudged the case or has formed an opinion on it, after hearing the claims of the contending parties, which should disqualify him in the premises; I refer generally to *Hudson*, pp.

* See 20 A. R. 86.

Judgment. 292-296, and *Ranger v. Great Western R. W. Co.*, 5 H.
Boyd, C. L. Cas. 73.

The injunction should be dissolved and the action dismissed, so far as this claim is concerned, but I will reserve costs till the close of the arbitration.

I note that this submission is irrevocable, so that one party cannot put an end to it, it being provided that it may be made a rule of court; but, without that, by our Act R. S. O. ch. 53, sec. 16, it cannot be revoked without leave of the Court. This matter is not raised in the pleadings, but I refer to it as it was argued.

[COMMON PLEAS DIVISION.]

ORGAN V. THE CORPORATION OF THE CITY OF TORONTO.

Municipal Corporations—Negligence—Ice on Sidewalk—Liability of Owner of Adjacent Building—Non-liability of Tenant—Consolidated Municipal Act, sec. 531.

In an action against a city municipality in which the plaintiff recovered damages for injuries sustained by her slipping on ice which had formed on the sidewalk by water brought by the down pipe from the roof of an adjacent building which was allowed to flow over the sidewalk and freeze, there being no mode of conveying it to the gutter, the owner of the building and the tenant thereof, were at the instance of the municipality made party defendants under section 531 of the Consolidated Municipal Act. The pipe in its condition at the time of the accident discharging the water upon the sidewalk had existed from the commencement of the tenancy. A by-law of the municipality required the occupant of a building, or if unoccupied, the owner, to remove ice from the front of a building abutting on a street within a limited time:—
Held, that the owner was, but the tenant was not, liable over to the municipality for the damages recovered.

Statement. THIS was an action brought against the corporation of the city of Toronto, for damages sustained by the plaintiff through the negligence of the defendants.

On the application of the defendants, the corporation of the city of Toronto, Margaret O'Grady and James O'Donohoe were made party defendants.

Irwin, for the plaintiff.

Statement.

Biggar, Q. C., for the city of Toronto.

J. D. Montgomery, for the defendant O'Grady.

D. O. Cameron, for the defendant O'Donohoe.

The plaintiff on the 18th day of January, 1893, while walking on the north side of Wellington street, about fifteen yards west of York street, in the city of Toronto, and opposite to certain premises known as the Shakespeare hotel, slipped on a smooth patch of ice which had formed on the sidewalk whereby she fell violently and was seriously injured. The ice was formed by water brought down by a conduit pipe running from the roof of the hotel to the ground, and on the water being discharged from the pipe there was no other mode for it to flow into the gutter, except by running over the sidewalk. The ice, it was proved, had been there several days.

Margaret O'Grady was the owner of the hotel, and James O'Donohoe was the lessee, and at the time of the accident, was in possession.

The jury found for the plaintiff.

It was objected that there was no legal liability on behalf of the defendants O'Grady and O'Donohoe.

The learned Judge at the trial entertained the opinion that the defendant O'Grady was liable over to the defendants, the corporation of the city of Toronto, but that the defendant O'Donohoe, was not liable over: he reserved his decision, and subsequently delivered the following judgment:—

September 4, 1893. MACMAHON, J.:—

I am confirmed in the opinion entertained at the trial, that the defendant, O'Grady, is liable over to the corporation of the city of Toronto; and that the defendant, O'Donohoe, is not liable over.

The case of *Wenzler v. McCotter*, 22 Hun 60, is exactly on all fours with the present. The head note to that case is:

Judgment. "The defendant was the owner of a house in the city of
MacMahon, Brooklyn; between it and the adjoining house was a leader,
J. which ran through the defendant's stoop, and emptied on the sidewalk in front of his house. This leader had originally been used to carry off the water from both houses, but at the time of the accident only the water from the adjoining premises passed through it. On December 27th, 1876, water ran through the leader out upon the sidewalk, and there formed a mound of ice, upon which the plaintiff, while passing along the sidewalk, slipped and fell." * * Held, that the leader running from the defendant's house and discharging the water upon the sidewalk, under such circumstances, was a nuisance, for which the owner of the house was liable, even though such house was, at the time of the accident, rented and in possession of a tenant whose duty it was to remove the ice from the street."

The judgment in that case, at p. 62, says: "It is urged that the proximate cause of the accident to the plaintiff, was the omission of the tenant to perform his duty of removing the ice from the sidewalk. The answer is that the ice was the immediate cause of the injury, and that the ice was upon the sidewalk in consequence of the wrongful act of the defendant. The negligence of the tenant in not destroying the consequences of the nuisance, cannot excuse the wrongful act of the defendant in creating it. Both may justly be held liable. * * His," defendant's, "liability springs from his wrongful interference with the sidewalk, by constructing or maintaining a pipe which discharged the water thereon when the weather was cold enough to freeze it."

The jury, in the case now before me, found that the pipe attached to the eave, projected over the sidewalk, and so caused the ice to form upon which the plaintiff slipped.

A by-law of the city of Toronto, No. 2464, sections 24 and 25, provides that the occupant of a building, or in case there is no occupant, then the owner of the building, shall, within four hours after a fall of snow, remove the

same from the front of any such building abutting on the street; and in case the snow is so frozen that it cannot be removed without injury to the sidewalk, then such person shall strew the same with ashes, sand or some other suitable substance. And in case the snow is not removed within twenty-four hours after it has fallen, the city engineer, or other person appointed for that purpose, is to prosecute the parties in default, and shall forthwith cause the snow and ice to be removed at the expense of the corporation, and keep an account of the expense thereof, so that the treasurer may recover the amount of such expenses by action or distress.

Judgment.

MacMahon,
J.

The corporation is primarily liable for such non-repair of the highway as caused an injury to the plaintiff; and section 531 of the Municipal Act, gives the municipal corporation a remedy over against another municipality or person making an opening or excavation, or placing an obstruction upon the street, etc. See *Township of Sombra v. Township of Moore* 19 A. R. 144, at p. 150, per Osler, J. A., and *Balzer v. Corporation of Gosfield*, 17 O. R. 700.

The defendant O'Grady, according to the finding of the jury, caused water to flow from the pipe upon the sidewalk, and so caused the obstruction to be placed upon the street, through which the plaintiff was injured; and upon that finding I am of opinion the city is entitled to judgment over against the defendant O'Grady. See *Skelton v. Thompson*, 3 O. R. 11; *McKelvin v. City of London*, 22 O. R. 70. But where the down pipe from the eave-trough extended over the sidewalk, and so conducted the water thereon, which was subject to being formed into ice by a fall in the temperature, existed when the defendant O'Donohoe became tenant of the premises, I cannot see how he can be made liable over to the defendant Mrs. O'Grady. To this extent I do not follow *Wenzler v. McCotter*, 22 Hun 60. See *Gandy v. Jubber*, 5 B. & S. 485; *Todd v. Flight*, 9, C. B. N. S. 377.

Although the city by-law requires the occupier or owner of premises to remove the snow or ice from the front of a

Judgment. building abutting a street, the failure of such occupier or
MacMahon, owner to remove snow or ice naturally accumulating
J. there, would not entitle the city to a remedy over, in the
event of a recovery by a person being injured through a
defect existing in the highway by reason of such accumu-
lation.

In *City of St. Louis v. Connecticut Mutual Life Ins. Co.*,
17 South West. Reporter 637, where the city of St. Louis
had an ordinance similar to the by-law of the city of Toronto,
requiring the citizens to remove the snow and ice in front of
their respective premises, the Court in its judgment in that
case, said: "Conceding that the city has the power to cause
obstructions to be removed at the expense of the owners of
the ground fronting thereon, (Charter, Art. 3, sec. 21, par.
9), and that the ordinances requiring such owners, imme-
diately after any fall of snow to cause the same to be
removed is a legitimate mode of exercising that power,
yet the city could not by passing such ordinance relieve
itself of its duty to the plaintiff, and to the public travel-
ling on its streets, of keeping its sidewalks in a reasonably
safe condition for travellers thereon, or transfer or impose
that duty upon another; nor can its liability for a failure to
discharge that duty be made contingent upon the liability of
the citizen to the city for a failure to discharge his duty
to the city in the matter of removing the snow as required
by ordinance. For a neglect of this duty by the citizen
the city might impose such a penalty as would be calcula-
ted to secure its performance, if it has the power to
impose such a burden; but it could not create a liability
to a civil action for damages by a private individual against
one who failed to discharge the city's duty in that behalf.
* * The damages recovered by Mrs. Norton were for a
breach of the city's duty to keep its streets reasonably
safe from defects resulting from the operation of natural
causes. To Mrs. Norton the defendant owed no such duty.
The only duty it owed in regard to the sidewalk was to the
city. That duty was created by the city in its ordinances,
in which it prescribed for itself and its citizens the meas-

ure of damages for its neglect in the penalty imposed for their violation. The damages the city was compelled to pay may have been the result of its failure to promptly and efficiently enforce its ordinances. But it was its duty to enforce them, and not that of the citizen. The duty of the citizen is to obey, and, if he failed to obey, to pay the penalty which the city imposes for such failure, and not the damages which the city may be compelled to pay for its neglect to perform its duty."

Judgment.
MacMahon,
J.

There must be judgment for the plaintiff against the city for \$300 and full costs; and there will be judgment over in favour of the city against the defendant O'Grady, for the amount of such judgment and the costs taxed, and the costs of the corporation in defending the action, including the costs of making the said O'Grady a party defendant to the suit.

The claim against the defendant O'Donohoe, is dismissed with costs, to be paid by the city of Toronto.

[COMMON PLEAS DIVISION.]

IN RE STAVELY—THE ATTORNEY-GENERAL OF ONTARIO

V.

BRUNSDEN.

Bastard—Sufficient Evidence of Illegitimacy—Declaration of Deceased.

In answer to a claim of heirship to one S., a witness, who had known him in England as a boy, before he came to Canada, alleged that S. had always been reputed to be illegitimate, and had been left by his mother on the parish, and that he had also known his reputed father, who bore a different surname. Another witness stated that S. had told him that one H. was his father, and that S. on his return from a visit to England said he had seen the place where his mother met with her misfortune :—

Held, sufficient evidence of illegitimacy to displace the claim of heirship.

Statement.

THIS was a motion on behalf of certain persons claiming to be the heirs and heiresses-at-law of James Stavely, deceased, to set aside or vary the interim report of the Local Master at Goderich, or to send the same back to him for further evidence, upon the ground that the evidence adduced did not justify him in finding that the said James Stavely was illegitimate.

November 22nd, 1893. *Scott*, for the plaintiff.

Garrow, Q. C., for the defendant.

Holt, for the alleged heirs and heiresses.

December 6th, 1893. MACMAHON, J. :—

James Stavely had for over forty-five years lived in Clinton, in the county of Huron, and was, at the time of his death in 1892, about seventy-four years old. He came from Bishop Burton, in Yorkshire, England, where William Sanderson, now a farmer in Hullet, had known him as a boy, and he (Stavely) was then on the parish. He alleged that he knew Stavely's reputed father by sight, and that his name was not Stavely : that Stavely was not born in wedlock, and that his mother left him on the parish, and

the parish had to keep him : that he was always called a bastard boy : and that while Stavely was being supported by the parish his mother went to the United States ; and that Stavely, after coming to Canada, lived occasionally with him (Sanderson).

Judgment.
MacMahon,
J.

Nicholas Robson, a merchant in Clinton, who knew Stavely since 1852, stated that Stavely came to his shop and asked if he (Robson) knew William Hutty, and was told in reply that he (Robson) had seen Hutty around town. Stavely then pointed Hutty out at the hotel across the road, and said, "My father's name was Hutty, some connection of this Hutty." And upon another occasion after Stavely's return from a visit to England, he told Robson that when he was in the Old Country he had seen the barn where his mother had met with her misfortune.

"The illegitimacy of a person is a matter which may be proved by the acknowledgment of the reputed father, and by general reputation, and the bastard himself may be examined as to such acknowledgment and reputation": Hubback on Succession, 649, citing *Rex v. St. Mary's, Nottingham*, 13 East 57, 58, note. "And it has even been held that the declarations of a person himself that he was illegitimate may be received to shew that the marriage of his parents took place subsequent to his birth": Hubback on Succession, p. 649, citing *Cooke v. Lloyd*, Peake's Ev. App., 78.

Cooke v. Lloyd, is referred to in Taylor on Evidence, 8th ed., sec. 636, but the case goes much too far according to my view. The question there was whether an elder son who had taken possession of the paternal estates and conveyed them to one of the litigants was born in wedlock, his own declaration that he was a bastard though made subsequently to the conveyance, was after his death received by Mr. Justice Le Blanc.

The correct view on the point is, I consider, stated in Taylor on Evidence, sec. 637, that "the declarations of a person deceased, asserting his own illegitimacy, cannot be received ; except as admissions against himself and those

Judgment. who claim under him by some title derived *subsequently*
MacMahon, *to the statements being made.*
J.

In Stavely's case there is not only his being supported by the parish of Bishop Burton: the general reputation of his being a bastard boy: that he was not born in wedlock; but also the statement that he had seen the barn where his mother met her misfortune; and that his father's name was Hatty.

In England the usual mode of registering the baptisms of legitimate children in modern times has been by describing them thus: "'William, son of John and Mary Stiles,' whilst in the baptisms of illegitimate children the name of the father was omitted, and the letter B prefixed or added:" Hubback on Succession, p. 253; *Cope v. Cope*, 1 Mo. & Rob. 269.

Had the certificate of the baptism of James Stavely been receivable it would have afforded some evidence of illegitimacy. It was not of itself evidence in this country, and should not have been received; but there was without it ample evidence to making out a *prima facie* case of illegitimacy of James Stavely.

The motion is dismissed. It is a case where the costs of all parties may well be made payable out of the estate.

[COMMON PLEAS DIVISION.]

REGINA V. JUSTIN.

Municipal Corporations—Way—Bicycle—Riding on Sidewalk—Conviction—Consolidated Municipal Act, sec. 496, sub-sec. 27.

A bicycle is a "vehicle," and riding it on the sidewalk is "encumbering" the street within the meaning of sub-section 27 of section 496 of the Consolidated Municipal Act, and of a by-law of a municipality passed under it.

A *certiorari* to bring up a conviction under the by-law was refused.
Regina v. Plummer, 30 U. C. R. 41, approved.

This was a motion by way of appeal, by the defendant in person, from a refusal by the learned Chief Justice of this Court to grant an order for a writ of *certiorari* to bring up a conviction for riding a bicycle on the sidewalk on Main street in the town of Brampton, contrary to section 8, of by-law No. 150, of the said town of Brampton. Statement.

In Michaelmas Sittings, December 5th, 1893, before ROSE and MACMAHON, JJ., the defendant in person supported the motion. Section 8 of the by-law is *ultra vires*. It prohibits the riding of a bicycle on the sidewalk without any restriction. The prohibition should only be where it is an encumbrance to the sidewalk. The sections of the Consolidated Municipal Act, 1892, which are relied on by the prosecution are sub-secs. 5 and 27 of sec. 496. Sub-sec. 5 cannot possibly apply, as riding a bicycle is not included in the words, "leading, riding, or driving of horses or cattle upon sidewalks." Sub-section 27 refers "to the encumbering, injuring, or fouling by animals, vehicles, vessels, or other means of any road, street, square, alley, lane, bridge, or other communication;" and sub-section 5 having expressly referred to sidewalks, if it had been intended to prohibit the riding of bicycles on sidewalks, it would have been expressly so enacted in that sub-section. A bicycle is not a vehicle within sub-section 27; but in any event that sub-section can only apply where it is shewn that the act

Argument. complained of causes an obstruction to the street: *Williams v. Ellis*, 5 Q. B. D. 175; *Taylor v. Goodwin*, 4 Q. B. D. 228; *Regina v. Nunn*, 10 P. R. 395; *Parkyns v. Preist*, 7 Q. B. D. 313. The next point is, that the by-law was not proved, and there is nothing to support the conviction: *Regina v. Dowsley*, 19 O. R. 622.

No one shewed cause.

December 30, 1893. ROSE, J.:—

Mr. Justin urged that the by-law was *ultra vires*, not being warranted by the provisions of sec. 496 of "The Consolidated Municipal Act, 1892." He referred to sub-secs. 5 and 27 of that section. I agree that the by-law cannot be supported under sub-sec. 5 which empowers a council to pass a by-law "for preventing the leading, riding or driving of horses or cattle upon sidewalks or other places not proper therefor." And it was argued that it cannot be supported under sub-sec. 27 which enables the council to pass a by-law "for regulating or preventing the encumbering, injuring or fouling, by animals, vehicles, vessels, or other means, of any road, street, square, alley, lane, bridge, or other communication."

As said in *Taylor v. Goodwin*, 4 Q. B. D. 228, and *Williams v. Ellis*, 5 Q. B. D. 175, the object of the Act must be considered; and it seems to me manifest that sub-sec. 27 was passed to enable a municipal council to keep free from encumbrances which would be inconvenient to traffic, any road or street, or any portion of any road or street.

The by-law in question, section 8, provides that "No person shall drive, lead, ride or back any horse or any other animal or waggon or other vehicle on or along any sidewalk in any public street or place within the town of Brampton. But this shall not apply to hand-carts, or baby carriages when propelled at a moderate speed but under all circumstances should these yield the right of way to pedestrians."

It is also manifest that the object of the by-law was to keep the foot walks or sidewalks free from undue interruption or encumbering so that passengers might conveniently pass and re-pass thereon. It is also clear that a bicycle propelled rapidly along the sidewalk might encumber the same so as to prevent the use of it by pedestrians. Assume that five or six bicycles were ridden abreast up and down a sidewalk at any hour of the day, whether at a low or high rate of speed would be immaterial, it is manifest that the sidewalk would not be free for the use of pedestrians, and that it would be encumbered just as much as if the whole sidewalk were taken up with bicycles placed side by side and supported in position on the sidewalk without being put in motion.

Judgment.
Rose, J.

Mr. Justin contended that riding a bicycle on a sidewalk is not encumbering it, arguing that the word "encumber" referred to objects at rest and not objects in motion. I find the word "encumber" is defined in Worcester's dictionary as follows: "To clog; to impede; to hinder; to obstruct." Other definitions also are given but these shew that the word has too wide a meaning to enable the contention to prevail.

In *Taylor v. Goodwin* 4 Q. B. D. 228, the Court held that a person riding a bicycle on a highway at such a pace as to be dangerous to passers-by, might be convicted of furiously driving a carriage. *Williams v. Ellis*, 5 Q. B. D. 175, should also be read as shewing the manner in which the statutes are construed for the purpose of giving effect to their object. In that case a bicycle was held not to be a carriage.

This brings us to the second objection taken which was that a bicycle was not a "vehicle." Referring again to Worcester's unabridged dictionary I find that a "vehicle" is defined as being that "in which anything is carried, a carriage, a conveyance." I have no doubt that a bicycle is a vehicle within the meaning of sub-sec. 27, and I think one would fail to give full effect to the fair meaning and object of the sub-sec, and of the by-law, if any other construction were placed upon the word.

Judgment.

Rose, J.

These were the only grounds of objection to the conviction. Both, in my opinion, fail, and I think the learned Chief Justice was quite right in refusing the order and that this appeal must be dismissed.

As no cause was shewn there will be no costs.

Since writing the above my brother Osler has very kindly referred me to the case of *Regina v. Plummer*, 30 U. C. R. 41, where the Court held in the words of the head note, that, "the use of a velocipede on a sidewalk, though no one be near it, may be an obstruction within the provisions of a by-law that no person shall by any vehicle encumber or obstruct the sidewalk,"—and, as will appear, the case is directly in point.

MACMAHON, J., concurred.

[COMMON PLEAS DIVISION.]

REGINA V. REDMOND.

REGINA V. RYAN.

REGINA V. BURK.

Public Health—R. S. O. ch. 205—By-law Prohibiting Unloading Manure on Railway Premises—Conviction—Validity of.

Held, that the unloading of manure from a car on a certain part of railway premises into waggons, to be carried away, came within the terms of a by-law, amending the by-law appended to the Public Health Act, R. S. O. ch. 205, and prohibiting the unloading of manure on said part of said premises: that the use of the word "manure," in the amending by-law, was not of itself objectionable; and that it was not essential to shew that the manure might endanger the public health.

A conviction for unloading a car of manure on the premises, as contrary to the by-law, was therefore affirmed.

THESE were three several convictions which were moved Statement. against on the grounds which are set out in the judgment.

The conviction in each case was, that the defendant did unlawfully unload one carload of manure from a car standing upon that portion of the Canadian Pacific Railway Company's premises, lying between, etc. (setting out the limits) contrary to a by-law of the municipality of the village of Weston, No. 135, and amending by-law No. 149.

These by-laws altered and amended the by-law set out in R. S. O. (1887), ch. 205, schedule A, and prohibited the placing or unloading on any portion of the railway company's premises, defined in such by-law, of any car containing manure.

The evidence shewed that the defendants were unloading manure from a car upon that portion of the premises of the company described in the by-law, and placing such manure on a waggon for the purpose of being taken away, and that the same was taken away from such premises.

In Michaelmas Sittings, November 24, 1893, before a Divisional Court, composed of GALT, C. J., and ROSE, J., *Aylesworth*, Q. C., supported the motion. The alleged

Argument. offence is not an infraction of the by-law. The offence aimed at by the by-law is unloading manure on any portion of the railway company's premises, that is, unloading and depositing and leaving on the premises. Here there was merely a removal from the car to the waggons. The removal also must be prejudicial to the public health. This is expressly provided for in the by-law made part of 'The Public Health Act,' R. S. O. ch. 205, schedule A. By-law 135 amends this by-law so as to prohibit the unloading, etc., of manure on certain defined premises. By-law No. 149 merely amends by-law No. 135, so as to extend the by-law to the railway premises. These by-laws must be read in connection with the by-law in "The Public Health Act." Evidence should have been given to shew that the manure was prejudicial to public health. The defendants also did not come within the terms of the by-law. They were merely servants or labourers carrying out the instructions of their employers Barton Bros., and the liability, if any, would be on them. If the by-law assumes to prohibit the removal of any manure without restriction, then it is *ultra vires*, as being beyond the powers conferred by "The Public Health Act," and is unreasonable and in restraint of trade. It would prevent not only the import of manure for the purpose of use, but also its export: *Regina v. Pipe*, 1 O. R. 43; *McKnight v. City of Toronto*, 3 O. R. 284. By-law No. 135 was also bad in not having the corporate seal duly attached. No authority was conferred on the clerk to attach the seal of his own motion made after the by-law was passed.

H. E. Irwin, contra. The offence comes within the terms of the by-law. The by-law prohibits the removal of manure within the prescribed limits, and there certainly was a removal here. The by-law which is part of "The Public Health Act," refers to manure without any restriction. The removal of manure is itself a matter prejudicial to public health, as the effect of the tossing and pitching the manure from the car to the waggons might set loose disease germs or noxious matter. The by-law is reasonable, and

is in no way in restraint of trade as the prohibition is confined to certain defined limits. The seal was properly affixed to by-law No. 135. It was affixed by the proper officer before the commission of the offence charged here. To carry out the argument of the other side it would be essential that every by-law should be sealed in the council chamber at the time it was passed. Then as to the defendants being mere servants or labourers, acting under instructions of Barton Bros., there is no evidence to support this. Argument.

December 30, 1893. ROSE, J.:—

Mr. Aylesworth objected that what the defendants were doing was not unloading within the meaning of the by-law.

I cannot yield to such contention. By-law 135 as amended forbids any person or persons unloading cars containing manure on such portion of the railway company's premises as is described by the by-law, and it seems to me that the cars are equally unloaded upon such premises whether the manure be deposited upon the ground or upon a waggon for the purpose of being carried away. What the by-law sought to prohibit evidently was having the car containing manure placed upon the premises at all, and it especially prohibited the unloading of manure from such car, no doubt, as was suggested in argument, fearing that the tossing or pitching of the manure from the car on to waggons, or otherwise, might set loose disease germs or noxious matter, and that it was in the interest of those residing in the neighbourhood that such action should be prohibited. The evidence supports a conviction in the words in which the convictions in question are drawn.

I think the word "manure" in the by-law is not objectionable. The same word is found in sec. 4 of schedule A to ch. 205; and I am further of opinion that it did not require evidence to shew that such manure might endanger public health. It is something which the statute enables

Judgment. the board of health to prohibit depositing, and I think
Rose, J. handling or unloading manure is prohibited by this by-law.

It was further urged upon us, that the by-law 135 had no seal placed upon it at the time it was passed. This depends upon the finding of fact from evidence which is contradictory, and we must take it that the magistrates have found the fact, and we have no power to review their finding.

It was also contended that the defendants were the servants of those who were the contracting parties removing the manure. It was well answered, I think, that the evidence does not disclose this, even if such objection were good. I have carefully gone over the evidence, and, beyond the statement that the horses and waggons were owned or used by the Barton Bros., whoever they may be, there is nothing to shew that the defendants were not the original contractors.

Regina v. Robert, decided by us in June last does not assist the defendants in any way on that point. It was a decision turning upon the construction of a particular by-law then under discussion (a).

I think, therefore, that the various grounds taken on the argument fail, and the motion must be dismissed with costs.

(a) That by-law amongst other things, restrained the making of excavations on vacant lots, except under certain restrictions, as provided for in the by-law ; and it was held that the by-law in its terms was restricted to the owners of the lots, and did not apply to a labouring man merely hired by the owner.

[COMMON PLEAS DIVISION.]

CLEVELAND PRESS V. FLEMING ET AL.

Prohibition—Division Court—Amount beyond Jurisdiction—Right of Judge to Amend by Striking off Excess—Division Court Rules 8, 188.

Where a claim for an account beyond the jurisdiction of the Division Court, is brought in that Court, the Judge at the trial has no power to strike out the excess so as to bring the amount within the jurisdiction.

THIS was an appeal from the judgment and order of Statement.
Mr. Justice Rose refusing the application of the defendant Fox for an order for prohibition to the tenth Division Court of the county of York.

The claim was for an advertisement inserted in *The Cleveland Press* for the defendants under the following contract, a copy of which was annexed to the summons :

“The Publishers of the *Press*, Cleveland, Ohio. Please insert our advertisement as described below, and charge \$117 gross, payable monthly, commencing immediately unless otherwise instructed below. Description of advertisement, 260 lines nonpareil. To run amongst pure reading matter, as per enclosed instructions to printer, in your daily editions. Signed, Geo. F. Wrigley, advertising agent for The Ladies’ Pictorial Company. The following are the particulars :

“368 l. nonpl. 38½ cts. line net\$141 68

“Interest 1 52

\$143 20

“And the plaintiffs claim interest on \$143.20 until judgment.”

The defendants filed a note disputing the jurisdiction of the Court.

There was evidence given at the trial that G. F. Wrigley who signed the contract was agent for the defendants, who were trading under the name of “The Ladies’ Pictorial Company,” and that the advertising had been done and not paid] for. A witness was also called to shew that

Statement. Osgoodby & Fleming, who formerly composed the company, had prior to the date of the order ceased to be members of the company, and that on the date the order was given W. H. Fox was the sole proprietor of "The Ladies' Pictorial Company."

At the conclusion of the trial the Judge considered the Court had no jurisdiction, but allowed the plaintiffs (notwithstanding the protest of defendants' solicitors) to abandon the excess over \$100, and gave judgment for that sum.

Mr. Justice Rose, refused the motion for prohibition, following *White v. Galbraith*, 12 P. R. 513.

In Easter Sittings, May 26th, 1893, before a Divisional Court, composed of GALT, C. J., and MACMAHON, J., *W. R. Smyth*, supported the motion. There was no jurisdiction in the Division Court Judge to try the case or to make the amendment striking out the excess so as to bring the amount within the jurisdiction. The account was admittedly beyond the jurisdiction of the Court. In *Sherwood v. Climie*, 17 O. R. 34, ROSE, J. held, that a claim of this character was beyond the jurisdiction of the Court, and that if the Division Court Judge should allow an amendment striking out the excess, he would be usurping jurisdiction. In the present case, ROSE, J., seemed to think he was bound by the subsequent case of *White v. Galbraith*, 12 P. R. 513, decided by ARMOUR, C. J., and by Division Court Rule 188, which allows the Judge to amend all defects and errors in any proceedings. The opinion of ARMOUR, C. J., was an *obiter dictum*, and is opposed to all the previous decisions. Rule 188 only applies to cases where the Judge has jurisdiction. It must be read with Rule 8, which requires the abandonment of the excess to be made in the first instance in the claim put in. The cases of *Elliott v. Biette*, 21 O. R. 595, and *Trimble v. Miller*, 22 O. R. 500, are quite distinguishable. In those cases, the amount of the debt sued for was within the jurisdiction; the excess being occasioned by the charge of interest which

was treated as damages and severable from the debt. See *Argument.* also *Re McKenzie and Ryan*, 6 P. R. 323; Sinclair's Division Court Act, 1879, p. 265. The amendment here was made after the case had been tried and all the evidence put in.

W. N. Miller, Q. C., contra. The cases of *Elliott v. Biette*, 21 O. R. 595, and *Miller v. Trimble*, 22 O. R. 500, are clear authorities to shew that the Division Court Judge had jurisdiction. In those cases, the excess struck out, no doubt, was interest, but the principle of the cases shews that it may be done in any case, and such is the view of the learned Chief Justice in *White v. Galbraith*, 12 P. R. 513, and though, as pointed out, it was not necessary for the decision of the case, it is, nevertheless, entitled to great weight. The powers of amendment given to the Judge by Rule 188 are sufficiently large to allow the amendment which was made here. Rule 8 merely applies to the act of the party making the claim, but does not interfere with the power of the Judge.

December 30, 1893. MACMAHON, J.:—

In my opinion the order for prohibition should have issued.

Notwithstanding the expression of opinion by the learned Chief Justice of the Queen's Bench Division in *White v. Galbraith*, 12 P. R. 513, I do not consider the Judge on the trial of a Division Court suit has authority, where the claim is beyond the jurisdiction of the Court, to allow the plaintiff to amend his claim by abandoning the excess so as to bring the cause of action within the jurisdiction of the Court.

Under the eighth rule of the Division Court Act, "where the excess is abandoned it must be done in the first instance on the claim." By the statute this rule has the same effect as if it were embodied in the Division Court Act. Therefore, the authority conferred upon the Judge by Rule 188,

Judgment. “to amend all defects and errors in any proceeding” can refer only to cases where he is clothed with jurisdiction and was not intended to apply so as to permit an amendment which would have the effect of abrogating Rule 8.

MacMahon,
J.

In *White v. Galbraith*, the plaintiff asked leave to amend by abandoning the excess of his claim above the amount over which the Court had jurisdiction which the Division Court Judge declined to allow. The motion was for a mandamus which the learned Chief Justice refused as it was discretionary with the Judge of the Division Court to allow or refuse the amendment. But the Chief Justice thought the discretion to permit the amendment existed.

In *Elliott v. Biette*, 21 O. R. 595, the Queen's Bench Division held that where the Division Court had jurisdiction at the time of bringing the action, but by the addition of interest accruing during its pendency, judgment was given for an amount beyond the jurisdiction of the Court, prohibition will be granted as to the excess, which in that case was seventy cents.

In *Trimble v. Miller*, 22 O. R. 500, where the amount of the claim was \$100, and the document upon which the claim was based did not provide for the payment of interest, and judgment was given for \$108.63—the amount of the claim and interest thereon—this Division followed *Elliott v. Biette*, holding, that as the interest must have been awarded as damages for breach of the agreement upon which the action was based, that the interest allowed as damages was severable from the amount due as appeared on the face of the claim, and prohibition was granted as to the excess.

In *Board v. Rhodes*, 8 Ex. 312, it was held that the County Court has no jurisdiction to try a case, where the plaintiff on the face of the summons claims a sum exceeding £50, and the Court cannot obtain jurisdiction by the plaintiffs offering at the trial to abandon the excess above £50. In the judgment at page 318, Pollock, C. B. said: “The offer to abandon the excess at the trial appears to us to make no difference as the claim from the first was one

over which the County Court had no jurisdiction. In that respect the case differed from *Isaac v. Wyld*, 7 Ex. 163, where the sum on the face of the summons and particulars did not exceed £50 but was taken out of the jurisdiction by the proof that it was a portion of a debt originally exceeding £50 and then the plaintiff was permitted to abandon the excess."

Judgment.
MacMahon,
J.

On referring to the report of *Isaac v. Wyld*, it appears that the claim in the plaint and summons was only for £50, and the particulars and demand stated various items of goods supplied at different times amounting in the whole to £50. On cross-examination the plaintiff admitted that the sum of £98, 19s. 2d. was due to him for goods supplied under the same contract. As the plaintiff had sued for only £50 he was permitted by the Judge to abandon the excess. See also *Re McKenzie and Ryan* 6 P. R. 323, where the plaintiff in a Division Court action sued the defendant for \$100 but indorsed on the summons as particulars a promissory note for \$125, and the plaintiff at the trial offered to abandon \$25 so as to bring the claim within the jurisdiction, an amendment was allowed, and the trial postponed to enable the defendant to be re-served. Hagarty C. J., refused prohibition upon the like ground that was acted upon by the Court in *Isaac v. Wyld*, 7 Ex. 163, namely, that the plaintiff by putting his claim at \$100 in the summons intended to abandon the excess of the claim as stated in the particulars.

In the present case the claim on the face of the summons was for \$143.60 and the indorsement on the summons was for the same amount. See *Forfar v. Climie*, 10 P. R. 90, and *Wiltsie v. Ward* 8 A. R. 549.

In *Sherwood v. Climie* 17 O. R. 34, at p. 37 my brother Rose made use of these pertinent observations: "It is a little difficult to see how a Judge who upon looking at the record sees that the claim is beyond his jurisdiction, has anything further to do with the matter except to refuse to try it. He sees that the parties have endeavoured to bring into Court a claim which the statute prohibits. If he allows

Judgment.
MacMahon,
J. an amendment he is asserting jurisdiction at a moment he has none and by a physical act is changing the face of the record so as to present an entirely different claim. If the paper writings before the Court were permitted to be used to evidence a new claim would not the suit be new?"

The appeal should, I think, be allowed and with costs.

GALT, C. J., concurred.

[CHANCERY DIVISION.]

HARTE

v.

THE ONTARIO EXPRESS AND TRANSPORTATION COMPANY.

KIRK AND MARLING'S CASE.

*Company—Shares—Assignment "in trust"—Surrender—54 & 55 Vic.
 ch. 110, sec. 4 (D.)*

By 54 & 55 Vic. ch. 110, sec. 4 (D.) power was given to any shareholder of the company to surrender his stock by notice in writing within a certain time. A shareholder desiring to surrender his stock transferred it within the time by an ordinary assignment to the president "in trust," both intending the transfer to operate as a surrender:—
Held, a valid surrender.

Statement³ THIS was an appeal from a judgment of the Master in Ordinary, placing one John M. Kirk upon the list of contributories as a stockholder in the above named company.

After the plaintiff Harte had obtained a judgment against the company, proceedings were taken to wind it up, and on settling the list of contributories as stockholders, John M. Kirk was found to be the holder of certain shares acquired by transfer from John W. Marling, and was placed on the list.

It appeared from the evidence, that Marling, who had become a shareholder while the company was in existence,

under 41 Vic. ch. 43 (D.), was desirous after it had been reorganized by 54 & 55 Vic. ch. 110 (D.), of taking advantage of the provisions for the surrender of his stock under section 4 of that Act, but instead of availing himself of the notice provided for by the statute, he transferred his shares to John M. Kirk, in trust. Kirk was then president of the company, and both he and Marling intended that such assignment should operate as a surrender. Kirk remained the transferee, and his name was allowed to stand on the books of the company as the holder of the shares until the winding-up proceedings took place, and for that reason the Master ordered that he should be put upon the list of contributories. Statement.

From this judgment of the Master, Kirk appealed, and the appeal was argued on November 9th, 1893, before BOYD, C.

J. B. Clarke, Q.C., for the appeal. The whole question is, what was the intention of the parties at the time of the transfer. The evidence shews that Marling intended to surrender, not to sell the shares, and Kirk did not intend to purchase or become a holder for his own benefit. He was the head of the company, and took the transfer "in trust." As to the form of transfer, I refer to Brice's Doctrine of Ultra Vires, 3rd ed., p. 327; Lindley's Law of Companies, 5th ed., p. 840; *In re Canadian Native Oil Co.*, L. R. 5 Eq. 118.

J. M. Clarke, for Marling, was not called on.

Hoyles, Q.C., for the liquidator. Kirk retained the shares in his own name until the liquidation proceedings were initiated. If he ever had any equities, it was too late to avail himself of them then, and they were consequently lost.

November 14th, 1893. BOYD, C.:—

In this case, the dealing was after the statute and within the time permitting a surrender. Marling wishing to get rid of his stock, turned it over to the president in the form

Judgment

Boyd, C.

considered by the president and others as the proper one in which to work a surrender, *i.e.*, by a transfer to the president in trust (*i.e.*, for the company).

I see no reason to doubt, that this was the substantial transaction—a getting in of the stock so as to merge it in the company and the mere form is not significant enough to overcome this conclusion. I would allow the appeal, so that Kirk's name be removed from the list of contributories—with costs of appeal to be paid by the liquidator out of the assets—but as to the claim against Marling,* the appeal should be dismissed with costs to be paid to him.

The turning point in this matter seems to me to be the date when the shareholders and company were clothed with power of surrender and forfeiture. Prior to the statutory power, there was no right to reduce the amount of stock by any such dealing, but thereafter the reduction of capital was sanctioned.

* In the appeal it was also asked in the event of Kirk's name being taken off the list of contributories, and the stock being held to be existing stock, that Marling's name should be substituted.—REP.

G. A. B.

[COMMON PLEAS DIVISION.]

DAGENAIS V. THE CORPORATION OF THE TOWN OF TRENTON.

Municipal Corporations—Ditches and Watercourses Act, R. S. O. ch. 220, sec. 5, as amended by 52 Vic. ch. 49, sec. 2 (O.)—Default of Engineer—Mandamus.

An owner of land, desiring to construct a drain on his own land and to continue it through that of an adjoining owner, served him with the notice provided by the Ditches and Watercourses Act, R. S. O. ch. 220, sec. 5, as amended by 52 Vic. ch. 49, sec. 2 (O.), to settle the proportions to be constructed by each, and, on their failing to agree, served the clerk of the municipality with the notice provided for by such Act requiring the engineer to appoint a day to attend and make his award. The clerk immediately forwarded the notice to the engineer, who was absent, and who declined to attend :—

Held, that a mandamus would not lie against the municipal corporation to compel their engineer to act in the premises.

THIS was an action tried before ARMOUR, C. J., without *Statement*. a jury, at Belleville, at the Autumn Assizes of 1893.

The action was for a mandamus to compel the defendants in pursuance of a notice, under the Ditches and Watercourses Act, R. S. O. ch. 220, to send their engineer to act and adjudicate between the plaintiff and one Graham, with reference to the construction of a ditch or drain through the plaintiff's and Graham's land.

The plaintiff and Graham were the owners of adjoining lands. The natural incline of the land was towards and over Graham's land to a living stream or creek thereon.

The plaintiff desired to construct a drain on his own land and continue it on Graham's lands to the stream or creek ; and, on the 13th December, 1892, served the notice, given by the Ditches and Watercourses Act, on Graham, notifying him that it was necessary as an outlet for the drainage of his, plaintiff's land, to continue a drain he was constructing on his own lands, through Graham's to the said stream or creek, and requesting Graham to attend, etc., at a time named, for the purpose of agreeing, if possible, upon the respective portion of such ditch or drain to be made, etc., by the several parties interested. The plain-

Statement. tiff and Graham met, but were unable to agree as to same.

The plaintiff then served on the clerk of the municipality the notice provided by section 5 of the Ditches and Watercourses Act, as amended by section 2 of 52 Vic. ch. 49 (O.), which, after stating the necessity for the drain, the notice served on Graham, the failure of the plaintiff and Graham to agree, etc., requested that the engineer appointed by the municipality be asked to appoint a day on which he would attend at the locality of the proposed ditch or drain and examine the premises, hear the particulars, and make his award under the provisions of the Ditches and Watercourses Act.

The clerk immediately notified the engineer and enclosed a copy of the notice. The engineer, who was at Sudbury, some hundred miles away, wrote the clerk that he could not attend to the matter.

Nothing having been done, the plaintiff notified the council of the above facts, and prayed to have the defendants perform their duty under the Act, in accordance with the notice, by ordering the engineer to perform his duties under the Act; and that in default of the compliance with said duty on their part, the plaintiff would be compelled to proceed by mandamus. The plaintiff again notified the defendants in the matter, but nothing having been done, this action was brought.

The learned Chief Justice reserved his decision, and subsequently delivered the following judgment :

November 1, 1893. ARMOUR, C. J. :—

I am of opinion that this action as framed is not maintainable.

At the time the requisition was served upon the defendant corporation, the defendant corporation had an engineer, and the clerk of the defendant corporation notified such engineer, enclosing a copy of such requisition as by law he was required to do.

The engineer, whose duties had for a long time compelled, Judgment. and were then still compelling, his absence many hundred Armour, C.J miles from Trenton, wrote to the clerk that by reason of such duties he was unable to attend to the requisition.

Under this state of circumstances this action was brought in effect to compel the defendants to compel their said engineer to act upon the said requisition.

I do not think that such an action will, under such circumstances, lie against the corporation.

The proper course would have been to apply to the council of the defendant corporation to appoint another engineer, and failing their doing so, to bring an action to compel them to do so.

The council ought upon receiving the answer of the engineer to the letter of their clerk enclosing a copy of the requisition, to have at once appointed an engineer or other person to act upon the requisition, but this they neglected to do until after this action was brought, and the engineer or other person then appointed did not proceed thereon as the law directs.

The action must be dismissed, but owing to the neglect of the council to perform their duty as above mentioned, it will be without costs.

The plaintiff moved on notice to set aside the judgment entered for the defendants, and to have the judgment entered in his favour.

In Michaelmas Sittings, December 6, 1893, before a Divisional Court composed of GALT, C. J., ROSE, and MACMAHON, JJ., *Clute*, Q. C., and *O'Rourke*, supported the motion. The corporation are responsible for the default of the engineer to do his duty. It is no answer that the engineer could not act. It was the duty of the corporation to see either that he did act, or put some one in his place who would act. Unless mandamus will lie against the corporation the statute would be of no avail: *White v. Corporation of Gosfield*, 2 O. R. 287; 10 A. R. 555; *Murray v. Dawson*, 17 C. P. 588.

Argument. *Marsh, Q. C., contra.* The remedy for the default of an officer called upon to do any duty under the statute is against the particular officer, and not against the corporation. The notice is to be served, not on the corporation but on the clerk, and the clerk is to notify, not the corporation, but the engineer, and therefore the default is not that of the corporation, but of the particular officer who is required to do the particular duty. An injunction will not lie against a corporation to compel them to take action against one of their officers for a breach of his duty, neither will a mandamus: *Attorney General v. Clerkenwell Vestry*, [1891] 3 Ch. 527; *Attorney General v. Guardians, etc. of Dorking*, 20 Ch. D. 593-605; *Regina v. Commissioners, etc. of Southampton*, 1 B. & S. 5; *Regina v. Mayor, etc. of Derby*, 2 Salk. 436. A mandamus also will not lie where there is another remedy; and an action lies against the engineer for the breach of his duty: *Re Whitaker and Mason*, 18 O. R. 63; *Re Marter and Court of Revision, etc. of Gravenhurst*, 18 O. R. 243.

December 30, 1893. ROSE, J.:—

The amending statute is 52 Vic. ch. 49 (O.). By it—section 2—the duty of the clerk and engineer is defined; the municipal corporation is not mentioned in the section.

If there has been any default under such section it has been the default of the engineer in not naming a time at which he would attend as he was required by such section to do.

It is not necessary to determine whether, if an application had been made against the engineer for a mandamus, it would, on the facts stated, have been successful; nor is it necessary to determine whether, if a demand had been served on the corporation to remove the engineer and appoint a new engineer, and there had been a refusal, an application for mandamus against the corporation would have been granted, for neither of such cases is before us on the pleadings or evidence.

The demand served on the corporation, was that "the engineer appointed by the municipality, be asked to appoint a day," etc. There is no such duty cast upon the council or corporation in terms by the statute. As I have pointed out the officers, viz., the clerk and engineer, are required to do certain acts, but not at the request of the corporation or council. If it is said that the council might have removed the engineer, the answer is at hand—it was never requested so to do.

Judgment.

Rose, J.

If, again, it is urged that the corporation might have applied for a writ of mandamus, a complete answer would be that it was not in terms asked to do so; or, if the demand could be construed as a request to make such an application, and there had been neglect or refusal on the part of the corporation, then *Regina v. Mayor, etc. of Derby*, 2 Salk. 436, shews that for such default the corporation is not subject to such an order as is here asked for, for the Court will not require one party to take proceedings by way of mandamus, or by way of motion for mandatory injunction, to compel another to do his duty.

I am, therefore, of opinion that the judgment was right, and that the motion must be dismissed with costs.

MACMAHON, J. :—

The plaintiff asks by his action for a mandamus to compel the defendants to send their engineer to act and adjudicate between the plaintiff and one Graham in the terms of a notice served on the defendant corporation under the Ditches and Watercourses Act, R. S. O., ch. 220, sec. 5, as amended by 52 Vic. ch. 49, sec. 2 (O.).

After the receipt of the notice, the clerk of the corporation duly forwarded the same to the engineer as required by section 8 of the Act. The engineer appointed by the town of Trenton (Mr. Evans), had for some time prior to the notice being given, been engaged at Sudbury, many hundreds of miles from Trenton, and when the notice reached him, he returned it to the clerk of the corporation, stating he could not attend to the matter.

Judgment.

MacMahon,
J.

It is only under very exceptional circumstances that mandamus will lie to compel a party to take certain proceedings for the benefit of another, as in *Regina v. Commissioners, etc. of Southampton*, 1 B. & C. 5, where a duty having been imposed by statute upon the defendants, the commissioners of the Port of Southampton, to collect certain duties, called petty customs, from exporters and importers, and pay a certain proportion of such duties to the town of Southampton, a writ of mandamus issued directing the commissioners to levy the duties from the exporters and importers at the port, and to pay over to the town its due proportion of such duties.

The general rule is, that a mandamus to one person to command another person to do an act, will not lie : *Regina v. Mayor, etc. of Derby*, 2 Salk. 436, where the Court said : " It is absurd that a writ should be directed to one person to command another."

The engineer being an officer of the corporation, upon his refusal to act, the plaintiff might have applied for a mandamus to compel him to perform his duty in the premises.

The law is clearly stated in Mechem on Public Officers, section 946. " But though the officer vested with discretion will not be compelled to reach any particular conclusion, he cannot refuse, in violation of his duty, to act at all, and if he does, mandamus may be resorted to to compel him to act,—to take whatever action is necessary as a preliminary to the exercise of his discretion, * * as the particular case may require."

The plaintiff has mistaken his remedy. He should have applied for a mandamus against Mr. Evans, the engineer of the town ; or, as stated in the judgment of the learned Chief Justice, should have applied to the corporation to appoint a new engineer, and, upon the neglect or refusal of the town to make such appointment, to apply for a mandamus to compel the corporation to do so.

The appeal must be dismissed ; the costs of the motion will follow the result.

GALT, C.J., concurred.

[COMMON PLEAS DIVISION.]

SELDON ET AL. V. BUCHANNAN.

Landlord and Tenant—Surrender at Law—Whether of whole or part of Lands Demised.

A lease to defendant, dated 1st April, 1885, for ten years, at an annual rent of \$120, payable quarterly in each year, contained a provision enabling the lessee to determine the lease by giving three months' notice in writing before 1st January in any year. The defendant for his own business only occupied part of the premises, and subleased the remainder. In November, 1891, the part subleased by defendant, being unoccupied, defendant verbally notified the lessor that unless the premises were repaired, he would have to surrender. The lessor treated this as a valid notice under the lease, and after negotiations with defendant it was agreed that defendant should have the portion of the premises occupied by him at \$24 a year, to take effect on 1st April following, but with a right to the lessor, should he sell, to cancel the same :—
Held, that what had taken place constituted a surrender in law of the whole of the premises, and not merely of the part not occupied by defendant.

THIS was an action to recover possession of part of lot Statement.
 number twelve on the east side of Shannon street and
 north of King street, in the town of Ingersoll, in the
 county of Oxford.

The action was tried before MACMAHON, J., without a jury, at Woodstock, at the Autumn Assizes of 1893.

The facts were as follows :—

On the 1st of April, 1885, one Joseph Gibson leased to the defendant for ten years the premises in question in this action, together with others, being part of an old music hall and an hotel, giving the defendant the right to sublease any part of the building he might think fit, and giving the defendant also the right to cancel the lease upon giving three months notice in writing before the 1st of January in any year. The defendant only requiring for himself the two lower stories of the music hall for a stable, sub-let the third story of it and the part comprising the hotel. The rent payable under the lease by defendant was \$120 a year, payable quarterly on the 1st of July, October, January and April in each year. In the autumn of 1891, those parts of the buildings not occupied by the defendant him-

Statement. self, being unoccupied, the defendant informed Gibson he would have to give up the premises on the following April, and between that time and the 1st April, 1892, there were some conversations between them as to the defendant giving up all the premises leased by him except what he required for himself, and which were the premises in dispute; and as to defendant paying a reduced rate for them. Nothing came of these conversations until about February, 1892, when Gibson got a chance to sub-let them, and the defendant gave him leave so to do. A few days before the 1st April, 1892, Gibson came to the defendant's office, and it was arranged that the defendant should retain the premises in question in this action, being the two lower stories of the music hall, and which were all he had ever used, at \$24 a year, and that the then tenants of the other portions of the building, who had been let into possession by Gibson, should be his tenants. At that time one quarter's rent was about to fall due on 1st April, and Gibson deducted from it what would be due at that time from the other tenants, and gave Buchannan credit for the balance. Nothing was said about surrendering the old lease, which still had two years to run, but after the bargain was completed Gibson stated to the defendant that if he got an opportunity of selling the whole property he would not like to lose the opportunity on account of not being able to give possession of the stable, and he said Buchannan answered, "If you get a chance to sell I won't stand in your way." On the other hand, the defendant and two witnesses, who were present on the occasion, said that when Gibson made the remark the defendant stated to him, "If you get a chance to sell come to me and you will not find me hard to deal with." After Gibson left the defendant's office that day he made the following entry in his own books:—"April 1st. Rented to Mr. T. Buchannan two lower stories of old music hall building for \$24 per year, free of taxes, to be cancelled in the event of my selling the property."

The lease, though for ten years, was never registered.

Shortly after the 1st April Gibson sold the whole of the hotel and music hall to the plaintiffs, and they set up that they had no notice of the lease, but at the trial notice to them before purchase was proved. Statement.

A few days after the purchase by the plaintiffs they wrote the defendant they would require the premises by the 1st June, 1892. The defendant denied their right thereto, contending that he was entitled to retain possession till the 1st May, 1895, when the lease would expire. The plaintiffs relied upon Gibson's memorandum, that the defendant was to go out of possession when he sold. Nothing, however, was done till the 28th February, 1893, when the plaintiffs served the defendant with a notice to quit on the 1st April, 1893. The defendant continued in the meantime to pay the plaintiffs \$6 quarterly, being the amount of the reduced rent, on the same days as he had previously paid Gibson.

Osler, Q.C., and *Jackson*, for the plaintiffs, contended that there had been a surrender of the old lease, and that the plaintiff's tenancy came to an end when Gibson sold; or, at all events, at the expiration of the year; and relied on *Tayleur v. Wildin*, L. R. 3 Ex. 303; *Jones v. Bridgman* 39 L. T. N. S. 500; *Sears v. Mayor, etc., of St. John*, 18 S. C. R. 702.

T. Wells (of Ingersoll), for the defendant, contended there was no surrender of the whole term, but that he gave up so much of the land as was agreed upon, and held the remainder at the reduced rent for the balance of the unexpired term created by the lease, and relied on *Baynton v. Morgan*, 22 Q. B. D. 74; *Nixon v. Maltby*, 7 A. R. 371; *Gault v. Shepard*, 14 A. R. 203; *Oastler v. Henderson*, 2 Q. B. D. 575; and cases collected in Woodfall on L. & T., 14th ed., 318.

The learned Judge reserved his decision, and subsequently delivered the following judgment:—

Judgment. November 17, 1893. MACMAHON, J.:—

MacMahon,
J.

The lease under seal from Gibson to Buchanan, is dated the 1st of April, 1885, and is for a term of ten years, at a rental of \$120 a year, payable quarterly on the 1st days of July, October, January and April, and contains a demise of other premises besides those sought to be recovered in this action. The lease gives a power to the lessee of determining the lease on the 1st day of April in any of the years throughout the said term, by giving to the lessor notice in writing on the first day of January immediately preceding, of his intention to determine the lease.

The defendant occupied, in connection with his business, only the portion of the premises sought to be recovered herein, the other portions demised by the lease being sublet by him to a number of tenants.

The defendant himself said that in the autumn of 1891 (it appears to have been in the month of November), he told the lessor, Gibson, it would be necessary to do something to make the premises tenantable, or he would have to surrender them. Gibson acted upon this verbal notice, as if it had been duly given in writing, and on the 4th of November, 1891, made an offer in writing to the defendant of the second floor and the floor above it—being the premises in question—for \$40 per year, free of taxes, “which, according to the terms of the lease, will take effect on the 1st of April, 1892.” This offer was not accepted by Buchanan; but about the last day of March, 1892, it was agreed that Buchanan should become tenant of the said second floor and the floor above it, at \$24 a year, the tenancy to commence on the 1st of April.

Under the agreement thus concluded, Gibson procured tenants for the other portions of the premises contained in the original demise, and collected the rents from the tenants until he sold to the plaintiffs, who have since collected such rents.

On the 1st of April, 1892, an agreement in writing was executed by Gibson and Buchanan, in which it is recited

that Gibson is owner of the lands mentioned in the lease of 1st April, 1885, and Gibson gives to Buchanan an option to purchase, for twenty days, at the sum of \$2,500. On the twentieth day Buchanan told Gibson he would not purchase. Gibson then sold to the plaintiffs, and Buchanan hearing of this, he, late in the night of the twentieth day, sent word to Gibson's house that he was prepared to purchase.

Judgment.
MacMahon,
J.

It is not necessary there should be an intention to surrender, as a surrender by operation of law may, and often does, take place independently of the intention of the parties. It has then to be considered whether what was done operated as a surrender in law of the whole of the premises demised by the lease of the 1st of April, 1885, and the creation of a new tenancy as to part; or, as contended by the defendant, that there was merely a surrender to the lessor of a part only of the premises, the lease for the remaining portion to continue at the diminished rent.

The law as to the surrender of part only of the premises, the lease standing good for the residue, is thus stated in Bacon's Abridgment (Leases, sec. 3) p. 882: "If lessee for years of lands accepts a new lease by indenture of part of the same lands, this is a surrender for that part only, and not for the whole, because there is no inconsistency between the two leases for any more than that part only which is so doubly leased; and though a contract for years cannot be so divided or severed, as to be avoided for part of the years, and to subsist for the residue, either by act of the party, or act in law, yet the land itself may be divided or severed, and he may surrender one or two acres, either expressly or by act in law, and yet the lease for the residue stand good and untouched, because here the contract for the residue remains entire, whereas, in the other case, the contract for the whole would be divided, which the law will not allow." See, also, on this point *Baynton v. Morgan*, 21 Q. B. D. 101 and 22 Q. B. D. 74, and *Holme v. Brunskill*, 3 Q. R. D. 495.

The defendant has entirely failed to make out a case

Judgment. to bring the new agreement entered into with his lessor within the principle above stated so as to entitle him to claim that there was a surrender of part only of the premises, the lease for the residue to stand good.

MacMahon,
J.

In *Wallis v. Hands*, [1893] 2 Ch. D. 75, Mr. Justice Chitty, at p. 82, says he prefers to state the proposition of law governing cases similar to the present as follows: "There is no surrender by operation of law unless the old tenant gives up possession to the new tenant at or about the time of the grant of the new lease to which he assents"—in this following *Davison v. Gent*, 1 H. & N. 744. Then what will constitute such "a giving up of possession" by the lessee as will under the above proposition effectuate a surrender by operation of law?

In *Reeve v. Bird*, 1 C. M. & R. 31, the facts were nearly the same as those in the case under consideration, the head-note to which is, "A., the tenant of a house, three cottages, and a stable and yard, let at an entire rent, for the term of seven years, before the expiration of the term assigned all the premises to B. for the remainder of the term, the house and cottages being in possession of under-tenants, and the stable and yard in that of A. The landlord accepted a sum of money as rent up to the day of the assignment, which was in the middle of a quarter. B. took possession of the stable and yard only. The occupiers of the cottages having left them after the assignment and before the expiration of the term, the landlord re-let them. A. paid no rent after the assignment, but the landlord received rent from the under-tenants. Before the expiration of the term the landlord advertised the whole of the premises to be let or sold." The Court (Barons, Parke, Alderson and Gurney) held that this was a surrender by operation of law of all the premises.

So in *Jones v. Bridgman*, 39 L. T. N. S. 500, which was an action for breaking and entering plaintiff's premises and for conversion of his goods, it was proved that the plaintiff Jones was tenant to defendants, under a lease granted in 1874, for seven, fourteen, or twenty-one years, of five

rooms or offices at £250 a year, and that in October, 1876, the plaintiff entered into negotiations with the defendants by which he was to hold three only of the rooms at a diminished rent, namely, £125 a year, and on the next quarter day paid and took a receipt for rent at the lesser rate. There was evidence that the parties intended that a written agreement should be prepared embodying the terms of the new arrangement; but they ultimately disagreed, and such agreement was never in fact signed. On the following quarter day the defendants claimed rent of the plaintiff under the old lease, which he repudiated. The Court held that the jury were justified in finding that there was a new tenancy, and therefore that there was a surrender by operation of law.

Judgment.
MacMahon,
J.

In the present case, the lessee, Buchannan, had a right under the lease to terminate the tenancy at the end of any year, which right did not exist in any of the cases from which I have been quoting. The power it is true, must be exercised according to the terms of the lease, by giving notice in writing, and Buchannan could not determine it by giving a parol notice: *Legg dem Scott v. Benion*, Willes 43; *Roe d. Gregson v. Harrison*, 2 T. R. 425, at p. 430. If Buchannan had, on or before the 1st of January, 1892, given written notice of his intention to terminate the lease on the 1st of April, 1892, the lease would *ipso facto* have terminated on that day. The letter from Gibson to the defendant, dated 4th November, 1891, shews he was acting under the verbal notice given by Buchannan, and it was unquestionably on the strength of the defendant's threat to surrender that the action of Gibson was based, in agreeing to terminate the tenancy on the 1st April, 1892.

The required notice from the lessee is for the benefit of the lessor, to enable him to secure another tenant. It is, therefore, only by reason of *Roe d. Gregson v. Harrison*, 2 T. R. 425, at p. 430, and similar cases, that I am precluded from holding that the verbal notice was acted upon by Gibson and the tenancy terminated at the end of the year, in accordance with the power conferred upon the lessee.

Judgment.

MacMahon,
J.

However, I am satisfied that there was a surrender by operation of law. The defendant had given notice of his intention to surrender; he gave up possession to his lessor; the lessor leased part of the premises to other tenants with the assent of the lessee; and the lessee became a tenant of the lessor of the remaining part under an agreement inconsistent with his former holding, and paid the rent under such last tenancy for a year; and he entered into an agreement by which he had the option to purchase, and by which agreement he admitted Gibson was the owner in fee and had the right to sell; and he endeavoured to induce others to purchase the whole property jointly with him.

The offer of Gibson contained in his letter of the 4th of November is to rent the two floors at \$40 a year. The amount of rent mentioned in the offer was finally reduced to \$24 for a year, to take effect on the 1st of April, 1892.

The defendant admits that when he was negotiating to rent the two places at \$24 a year the remainder of the term of the original lease was not alluded to.

It is, I think, clear there was a tenancy for a year certain of the two flats from the 1st of April, 1892, with an agreement between Gibson and Buchanan that if Gibson sold the property during the term the lease was to be cancelled. The day after the tenancy was created Gibson made in his ledger the following memorandum: "April 1st. Rented to Mr. T. Buchanan two lower stories of old music hall building, at \$24 per year free of taxes, to be cancelled in the event of my selling the property." This I find was the bargain, although Gibson's statement was denied by Buchanan and contradicted by Buchanan's brother, who said that after the bargain was concluded and Gibson had left the premises, he returned and opened the door and said he did not want the \$24 arrangement to stand in the way if he should sell; and that defendant answered, "If you sell come to me and I won't be hard with you," which was all, he said, that then passed. But this witness made the remark, during the negotiations for the tenancy, and at the time the agreement was being concluded, that

“it would be unreasonable to tie up the property at \$24 a year,” which must have had reference to some stipulation Gibson was insisting upon having attached to the agreement for the tenancy. And Duncan, the bookkeeper of Buchanan, admitted that when Seldon called up by telephone a few days after the purchase, he asked Seldon when he wanted possession, evidently at that time having in his mind that if Gibson sold the purchaser was to have immediate possession, although when in the box he gave a like account of the agreement between Gibson and Buchanan to that given by the defendant and his brother.

Judgment.
MacMahon,
J.

The plaintiffs, upon becoming purchasers, by written notice, demanded that possession be given them on the 1st of June, 1892. Their subsequent receipt of rent does not deprive them of their right to have the agreement entered into with Gibson to give up possession enforced.

But, assuming—as I have found—that Buchanan was tenant for a year, he was obliged to give up possession without notice on the 1st of April, 1892.

The plaintiffs refused to accept rent after the 1st of April, 1893.

There must be judgment for the plaintiffs for possession of the premises claimed with \$50 for *mesne* profits, with full costs of suit.

[CHANCERY DIVISION.]

IN RE COWAN V. AFFIE.

Trial—Division Court—Res Judicata—Question for Jury—Jurisdiction—Mandamus to Judge.

When an issue arises on the plea *res judicata* the identity of the facts in the former case with those in the existing case is matter for the jury when the trial is by a jury in a Division Court. In a case in a Division Court where the defence of *res judicata* had been raised, and in which a jury notice had been given, the Judge determined the case himself, and refused to allow it to be tried by a jury:—

Held, that he had no jurisdiction to do so, and that a mandatory order must go to compel him to try the case in accordance with the practice of the Court.

Statement. THIS was a motion for a mandamus directed to the Judge of the First Division Court of the county of Prince Edward, requiring him to proceed with the trial of a certain action under the circumstances which are fully set out in the judgment.

The motion was argued on December 11th, 1893, before FERGUSON, J.

Aylesworth, Q. C., for the motion. The nonsuit does not bar a new action by Affie: R. S. O. ch. 51, sec. 114. A nonsuit in the Division Court has the same effect as it, had before the Judicature Act in the Superior Courts: *Building and Loan Association v. Heimrod*, 19 C. L. J. 254; *Bank of Ottawa v. McLaughlin*, 8 A. R. 543. As to the right of a jury; R. S. O. ch. 51, secs. 154, 156, 167; *Lewis v. Old*, 17 O. R. 610. *Res judicata* is a question of fact to be tried by the jury. The greater part of the plaintiff's claim in this action was not, and could not have been included in the former action.

G. H. Watson, Q. C., for the defendant. There is a judgment of nonsuit in this case; judgment has been given and nothing is pending: *Coolican v. Hunter*, 7 P. R. 237; *Williamson v. Bryans*, 12 C. P. 275. This judgment cannot be amended here: *In re Burns v. Butterfield*,

12 U. C. R. 140. There are other remedies, and therefore this motion does not lie: *In re Moulton & Haldimand*, 12 A. R. 503; *Queen v. The Registrar of Joint Stock Co's*, 21 Q. B. D. 131; *In re Nathan*, 12 Q. B. D. 461; *Meyers v. Baker*, 26 U. C. R. 16. Argument.

Aylesworth, in reply. This is not a case for an application for a new trial: R. S. O. ch. 51, sec. 145. The Judge found in favour of the defence without hearing the plaintiff's case. The present judgment being without jurisdiction cannot stand in the way.

December 22nd, 1893. FERGUSON, J. :—

This motion is for a mandatory order or mandamus to be directed to Edward Merrill, Esq., Judge of the County Court of the county of Prince Edward, and *ex officio* Judge of the First Division Court in the said county of Prince Edward, commanding the said Judge that, as soon as may be, in accordance with the course and practice of the said Division Court, he do proceed to hear and determine a certain plaint in the said Division Court, wherein one Richard Cowan is plaintiff, and one George F. Affie is defendant; and in which plaint the summons to the defendant issued out of the said First Division Court on the 26th day of July, 1893.

In order to the full understanding of the matter and the positions of the parties therein, it will be necessary to refer to the proceedings in a former suit between the same parties and in the same Court, in which, however, Affie was the plaintiff, and Cowan the defendant.

That suit was commenced on the 9th day of May, 1893, and the plaint is stated as follows:

“George F. Affie of the township of Hallowell, in the county of Prince Edward, claims of Richard Cowan of the town of Picton, the sum of \$45.15, the amount of the account, a copy of which is under written, together with the interest thereon.”

Judgment. "1893, May 2nd, to 2 hogs, weight 860 lbs., at
 Ferguson, J 5½ cts. per lb., live weight,\$45.15."

The defence to this claim put in by the defendant, was as follows:

"The defendant disputes the plaintiff's claim in full. As a set-off or counter claim to the plaintiff's demand, the defendant claims of the plaintiff the sum of \$5 for keeping and feeding the plaintiff's hogs from the 2nd May, 1893."

"Dated May 12th, 1893."

The judgment in the case is as follows:

"This case having been heard at the sittings of this Court, held on the 5th day of June, 1893, and judgment having been postponed, and the 28th day of July, 1893, at the hour of three o'clock in the afternoon, named as the time for delivery thereof in writing at the clerk's office, and the case having been duly considered, it is ordered that judgment of nonsuit be entered against the plaintiff without costs. Dated 17th day of July, 1893."

"N. B. The clerk will, at the time appointed, read this decision to the parties or their agents, if present, and forthwith enter judgment according to the statute in that behalf."

The claim of the plaintiff in the suit giving rise to this motion, is as follows:

"Richard Cowan, of Picton, claims of George F. Affie, of Hallowell, the sum of \$32. The following are the particulars:

"To 80 days keep of two hogs, the property of the defendant, from 2nd May to 21st July, 1893, both days inclusive at 40 cents per day.\$32.00."

"The plaintiff requires this action to be tried by a jury. Dated 25th July, 1893."

The defence put in to this claim, was as follows:

"1. The defendant disputes the plaintiff's claim in full.

"2. The defendant says that the subject matter of the plaintiff's claim herein, had before the issue of the summons in this action, become, was, and still is, by virtue of

the judgment pronounced by this Honourable Court, on the day of , 1893, in a certain action in this Honourable Court lately pending, wherein the above named defendant was party plaintiff, and the above named plaintiff was party defendant, and being action number , 1893, *res judicata*, and such judgment has not been reversed or set aside, but was, at and before the commencement of this action, and still is in full force and effect; and the defendant pleads said judgment between the same parties as to the same subject matter in bar of this action. Dated this 4th day of August, 1893."

Judgment.

Ferguson, J.

The suit came on for trial at the sittings of the Division Court, held on the 12th day of September, 1893. A jury had been duly summoned and was present to try the action. Mr. Widdifield appeared for Cowan, and Mr. Alcorn appeared for Affie. Mr. Widdifield in his affidavit says, that when the case was called, the bailiff proceeded to call the jury, when Mr. Alcorn, on behalf of the defendant Affie, objected to the action being tried on the ground that the matters in dispute were *res judicata*, referring to the judgment in the former case, and that he, Widdifield, on behalf of Cowan, contended that he had a right to have the facts submitted to the jury; and that even if evidence was admitted to shew that the matters in question in this action, were finally disposed of in the former action (which he did not admit), a judgment of nonsuit in the Division Court, could be no bar to this action; and he says that, notwithstanding his objection, the learned Judge refused to allow the jury to be sworn or to try the matter of the plaint, and entered a judgment of nonsuit against Cowan.

Mr. Alcorn, in his affidavit, says there was no contention raised by Mr. Widdifield as to the particular mode of trial, nor was there any refusal on the part of the learned Judge to try the action by that or any specified mode; that upon his submitting the truth and force of the defence filed, the Judge said he agreed with him, and that he intended to dispose finally of both claim and counter-claim in the for-

Judgment. mer action ; and that the subject of the plaint prescribed
Ferguson, J. for trial, was the same matter " of which he had disposed " in the former action ; that he had fully intended to dispose of both claim and counter-claim, and had done so ; and that if necessary, and so far as he had power, he would make any amendment in his judgment to effect his said purpose ; and that he, Alcorn, replied that he did not ask for any such amendment.

He says there was no refusal to try by jury, but only a holding by the learned Judge that there was nothing to be tried by any mode of trial.

The record of his judgment made by the learned Judge himself, is as follows :

" JUDGMENT."

" Upon the application of the defendant by his counsel in open Court, and upon hearing counsel for the plaintiff, I do order that judgment of nonsuit be entered against the plaintiff on the ground that the matter was disposed of in a former suit in this Court between the same parties, and I amend the judgment in that case if it requires amendment, and if I have the power to amend it, dismissing the counter-claim which was my intent at the time. No costs to either party.

" Dated this 12th September, 1893."

It is not disputed that the plaintiff did all that was necessary to entitle him to have his case tried by a jury. In the case *Re Lewis and Old*, before the Queen's Bench Division, 17 O. R. at p. 619, one of the learned Judges in delivering the judgment, said : " It appears plain that a party who is entitled to give, and does properly give, a notice desiring to have his case tried by a jury in the Division Court, is entitled to have it tried by a jury in the same way and to the same extent that a party to an action of slander or malicious prosecution in the High Court, is entitled to have it tried by a jury." And in that case it is also said that the rules governing trial by jury, are equally applicable to an action in the Division Court tried

by a jury, as to an action in the High Court tried by a Judgment. jury. In that case it was held that the learned Judge had Ferguson, J. exceeded his jurisdiction by assuming the functions of the jury, and the right to have the case submitted to the jury, being an absolute statutory right, the violation of it was ground for prohibition.

In *Coolican v. Hunter*, 7 P. R. 237, it was held that a mandamus does not lie to command a Judge of a County Court to alter his adjudication upon matters within his jurisdiction.

In the present case, while the jury was being sworn, the learned Judge, before the plaintiff had an opportunity of giving any evidence in support of his claim, on being moved so to do, seized the issue raised on the defence setting up a former adjudication of the matter in dispute, and thereon determined (in form at least) the case against the plaintiff without letting it go to the jury for their consideration at all.

It is, I think, entirely plain that this issue was one to be determined by the jury and not by the Judge. Surely the question as to whether or not the matters that had been determined (if any had been determined) in the former action, were the identical matters in respect of which the plaintiff brought this action, was a question of fact that could be determined only by the jury, the case being one in which the plaintiff was entitled to a trial by a jury; and even if it be assumed that the learned Judge had knowledge, even complete knowledge on this subject, this would constitute no valid reason why he should determine the question without submitting it to the jury for their consideration. Besides one does not see that the learned Judge had such complete knowledge, for in the former suit the set-off or counter-claim was for the sum of \$5 only, being for the feed or keep of the hogs for about ten days, whereas, in the present suit the claim is for \$32, being for the feed or keep of the hogs,—if it be assumed that they were the same hogs (a question that was also one for the jury), for a period of eighty days. Then there

Judgment. was not at the trial of the former suit, nor when the judgment therein was delivered, any determination as to the matter of the counter-claim therein. The learned Judge seeing this at the trial of the present action, sought to amend the judgment in the former action by disposing of the counter-claim, apparently doubting his power so to do. I do not consider it material or necessary to say whether he had such power or not.

Ferguson, J.

The plaintiff had, as I think, a clear right to have the jury empanelled and sworn, and to give before them his evidence in support of his claim; and if this evidence when given were such that in the opinion of the Judge it should be submitted to the jury for their consideration, that is, evidence on which a jury might find for the plaintiff without a violation of all reason, then upon the evidence in support of the defence being given, all the questions of fact should be determined by the jury, the learned Judge having and exercising the same powers as those possessed by a Judge sitting at *Nisi Prius* in cases tried (and that must be tried) by a jury.

I am of the opinion that the learned Judge in acting as he did, assumed the functions of the jury, and, in the circumstances, acted without jurisdiction.

It also seems to me very clear that by so acting, the learned Judge deprived the plaintiff of his clear legal statutory right to have his case tried by a jury. The plaintiff was thus, in my opinion, by an act of the learned Judge, done with no matter how good an intention, yet done without jurisdiction, deprived of a clear legal right, which was to have his case tried by a jury.

There was no contention before me as to the sufficiency or not of the evidence respecting a "demand" or "refusal." It was rather assumed that what took place in Court, and the course taken and persisted in by the learned Judge, were sufficient in this respect; and as the notice of motion was duly served upon the learned Judge, as well as upon the defendant, and no contention raised upon the subject, I do not further consider it, but proceed upon the assump-

tion that there was a sufficient "demand" and "refusal," Judgment.
even if these are to be considered as essential as they were Ferguson, J.
under the older practice, and before the passing of 44 Vict.
ch. 5, sec. 17, sub-sec. 8 (O.).

I do not perceive that the difference in the ways of stating what took place at the trial, appearing in the affidavits of the respective solicitors or agents of the parties, is of any materiality. From what is said, it is not difficult to see the whole of the situation.

I am of the opinion that the judgment of nonsuit pronounced in the case, having been pronounced without jurisdiction of the learned Judge in his so doing, the case is still pending in the Court without any judgment therein, and I do not think that the contention that there was a remedy other than the one by mandamus, open to the plaintiff and equally convenient and effective, namely, by way of motion for a new trial, can, in the circumstances, succeed.

Many authorities were referred to by counsel. I have perused them all and considered as well as I have been able, all the arguments, many of which were ingenious, pointed, and incisive, and I have arrived at the opinion that the plaintiff has shewn that he is entitled to the order that he has asked for. An order for a mandamus will, therefore, go.

I do not make any order as to costs.

A. H. F. L.

[CHANCERY DIVISION.]

SMITH V. THE FORT WILLIAM SCHOOL BOARD ET AL.

Public Schools—Cost of Erection—Ultra vires Contract—Municipal Corporation—Injunction—54 Vict. ch. 55, sec. 116 (O.).

The school board of a city, town or incorporated village has no authority to contract for the building of a school house, until the necessary funds have been provided, under 54 Vict. ch. 55, sec. 116, or for one involving the expenditure of any greater sum than has been so provided.

The plaintiff, a freeholder, ratepayer and elector of the town of Fort William, and a supporter of the public schools therein, suing on behalf of himself and all other ratepayers, was held entitled to an injunction to restrain the proceeding with the erection of a school house, in a case where the contract price exceeded the amount provided under section 116, and to an order compelling the repayment to the school corporation of certain sums paid by individual members of the school board to the contractors for a portion of the work already performed.

Statement.

THIS was an action for an injunction to restrain the construction of a school building in the town of Fort William, and to compel repayment to the school corporation of moneys paid to the contractors for the building under the circumstances, which are fully set out in the judgment.

The action was tried before STREET, J., without a jury, at the Autumn Assizes, at Port Arthur, on November 8th, 1893.

B. B. Osler, Q. C., and Frank H. Keefer, for the plaintiff.
Aylesworth, Q. C., and Gorham, for the defendants.

The following cases were cited: *In re Olver and the City of Ottawa*, 20 A. R. 529; *Re Board of Education of Napanee and the Corporation of the Town of Napanee*, 29 Gr. 395; *Wallace v. Township of Lobo*, 11 O. R. 648.

December 30th, 1893. STREET, J. :—

This action was brought by a resident freeholder, ratepayer, and elector and supporter of the public schools in the town of Fort William, on behalf of himself and all other ratepayers of Fort William, except the defendants, against

the public school board of that town, certain individual members of the board, and Messrs. Robertson & Ross, contractors, for an injunction to restrain the defendants from proceeding with the erection of a school building in the town, and to compel the repayment to the school corporation of certain sums of money paid by the individual members of the school board to the defendants, the contractors for the work.

Judgment.

Street, J.

The facts material to the decision of the case in the view I have taken of it, as proved at the trial, are as follows :—

On September 12th, 1892, the school board of the town of Fort William applied in writing to the municipal council of the town asking them to submit a by-law to the people to raise by debentures \$12,000 for the purpose of building a new school house. The municipal council accordingly passed the necessary by-law for the raising of \$12,000, reciting that the school board had required them to borrow that sum for the erection of a public school house in the town. This by-law was submitted to the ratepayers during the following February, and was carried.

Tenders were called for by the school board for the erection of a school house according to certain plans prepared by them ; and the tender of the defendants Robertson & Ross, was accepted by them. The amount of this tender was \$18,860, and it did not cover any system of heating or ventilating the building, nor the clearing and fencing of the ground upon which the building was to be erected. It provided for the completion of the building by November 1st, 1893, and payment of eighty-five per cent. of the contract price, as the work proceeded, and the balance in full in thirty days after completion. The contract was executed at the end of June or the beginning of July by the contractors, and by the acting chairman and secretary of the school board, but the seal of the school board was not affixed, I think, until after action.

The contractors were ratepayers of the town, and were

Judgment.

Street, J.

aware of the passing of the by-law for the raising of \$12,000 for the building of this school house; that no further sum had been authorized, and before entering into the contract, had taken legal advice, and been advised that the school board had power to obtain such further sum as was required to complete the school house from the municipal council. They then proceeded with their work, and the plaintiff began this action on the July 28th against the school board and the municipal corporation of Fort William only. On August 5th he applied for and obtained from the learned local Judge at Port Arthur, an injunction restraining the defendants from proceeding with the work and from further dealing with the matter in variation from the money vote of \$12,000. On September 8th, the motion to continue the injunction came before my brother Ferguson, and he made an order allowing the plaintiff to amend by adding parties, and continued the injunction until September 16th. The plaintiff thereupon amended his proceedings by adding certain members of the school board and the contractors as defendants; and on September 26th, obtained an injunction against all the defendants to the hearing. The contractors and the defendants, the members of the school board, were notified on August 5th of the injunction obtained on that day, and work was at once stopped. The contractors had at that time excavated the foundation and driven some piles to form part of the foundation of the building; and they had received from the defendant, George A. Graham, the chairman of the school board, \$1,325 on account. After becoming aware of the injunction, they received from Mr. Graham a further payment of \$1,300 upon the contract; all these sums being paid out of the \$12,000 obtained from the municipal council. The last payment was made with some hesitation and consideration in view of the existence of the injunction, but with the authority of the building committee of the school board, the defendants Hacquoil, Murphy, and Macdougall, who were also aware of the injunction. The defendant Graham stated that the

board expected that the land, building, heating, ventilation, and fencing would cost \$21,216; and that he understood the council were bound to provide what was required beyond the \$12,000, upon being required by the school board to do so.

Judgment.

Street, J.

A number of questions were raised by the defendants as to whether the board had ever in fact authorized the execution of the contract, and had in fact ever properly become parties of it; but I think the case must be determined upon broader grounds than these, that is to say, upon the power of the school board to bind the school corporation to erect a building for which they had not the means to pay.

By various sub-sections of section 107 of ch. 55, of 54 Vict. (Ontario Statutes for 1891), the powers and duties of the board of school trustees of cities, towns, and incorporated villages are declared.

Sub-section 3 requires them to provide adequate school accommodation.

Sub-section 4 requires them to purchase or rent school sites and to build school houses.

Sub-section 10 requires them to submit to the municipal council on or before August 1st, or at such time as may be required by the municipal council, an estimate of the expenses of the schools under their charge for the current year.

Section 110 provides that "The municipal council of every city, town, and incorporated village shall levy and collect upon the taxable property of the municipality, in the manner provided in this Act, and in the Municipal and Assessment Acts, such sums as may be required by the public school trustees for school purposes, subject to sections 116 and 117 of this Act."

Section 115 directs what is to be done by the municipal council of a township upon the application of any board of rural school trustees (as distinguished from the boards of cities, towns, and incorporated villages), for the issue of debentures for the purchase of a school site, for the

Judgment. erection of a school house, or for the purchase or erection
Street, J. of a teacher's residence.

Then section 116 provides that "where application is made by a township board of trustees, or by the trustees of any city, town, or incorporated village, for any of the purposes mentioned in the preceding section, and where the municipal council refuses to raise or borrow the sum required; then the question shall be submitted by the municipal council, if requested by the board of trustees, to the vote of the electors of the municipality, who are supporters of public schools, in the manner provided by the municipal Act for the creating of debts, and in the event of the assent of such electors being thereby obtained, then it shall be the duty of such council to raise or borrow such sum."

(2.) "The municipal council may, if deemed expedient, without submitting the same to a vote of the ratepayers of such municipality as required by the Municipal Act for the creating of debts, pass a by-law for the purpose of raising or borrowing money on the requisition of the public school board for any of the purposes named in the preceding sections."

Section 119 provides that "when in the opinion of any rural school corporation it is not desirable to apply to the municipal council for the issue of debentures for any of the purposes mentioned in this Act, such trustees may without a vote of the ratepayers of the section require the municipal council to raise by one yearly rate such sum as may be necessary for the purchase of a school site, the erection or purchase of a school house or teacher's residence."

An examination of these provisions shews that while the trustees of urban school boards may require the municipal council to levy and pay over to them the amounts needed for the ordinary expenses of the schools in their charge, their right to obtain money for the purpose of building a school house, or buying a school site, is not an absolute one, but is dependent upon their being able to

obtain the consent of another body, which may be the municipal council, or may be the general body of public school supporters according to circumstances. It is plain that however urgent they may deem their need to be that a school house should be built, unless they can obtain the assent of the council or the electors to the scheme, they are absolutely without any power to obtain the necessary funds. I think the natural effect of such a limitation upon their powers, must be the same as if the legislature had in direct terms enacted that no urban school board should enter into any contract to build a school house until they had obtained the passing of a by-law of the municipal council for the purpose of raising the money with which to build it.

It cannot be assumed that the legislature intended to allow them to contract a debt without any means of paying it. If allowed to contract the debt, and if they can manage to build the school house, the fact that it has been built, will almost compel the municipal council to pay for it, in many cases where they would have refused, and the electors would have refused to authorize the expenditure in advance, and thus the plain object of the legislature of enabling the council or the electors to consider it upon its merits, would be defeated. I think it highly necessary that none of the safe-guards which the legislature has thought fit to interpose between the zeal or the possible extravagance of school boards, and the public which is to find the money should be disregarded. Then if it would be dangerous to allow a school board to force the hand of the electors by completing a school house, and then asking for the money with which to pay for it, it would be equally so to allow them to obtain a sum of \$12,000 for the purpose of building a school house, and then to enter into a contract to spend \$21,000 or \$22,000 upon it. The inevitable result would be that after spending the \$12,000, they would go to the council and say that the money spent would be lost unless enough were supplied in addition to enable them to complete the building. The only safe prin-

Judgment.

Street, J.

Judgment.

Street, J.

ciple to be laid down, in my opinion, is that the school board of a city, town, or incorporated village, have no power or authority to enter into any contract for the building of a school house until the necessary funds have been provided under section 116; and that if a certain sum has been provided under that section for the purpose of building a school house, they cannot be allowed to enter into any contract or undertake any work involving the expenditure of any greater sum.

I must hold, therefore, that the contract into which the defendants, the school board entered, was beyond their powers and was not binding upon them, and I must make the injunction perpetual. It was incumbent, I think, upon the contractors, the defendants Robertson & Ross, to enquire as to the powers of the board; whether it was so or not, they did enquire into them and became aware of the fact that the board was contracting far beyond the moneys it had been authorized to spend, and they, therefore, went into the contract with full knowledge of all the facts. The defendants, the members of the school board, who have been the active agents in the matter, were also well aware of all the facts from the beginning. They had no right to pay to the contractors, and the contractors had no right to receive any money upon the contract. It may be that the work which has been done upon the land owned by the school board, is of some value to the board as the foundation of a smaller building or otherwise; if so, they should make an allowance for it. There will be a reference to John M. Hamilton, Esq., to ascertain this, and the defendants, other than the school board, must be ordered to pay back to the school board the whole of the \$2,625 paid on account of the contract with interest from the time of payment, less such sum, if any, as the referee shall find, should be allowed by the school board, in reduction of it under the reference I have indicated.

The defendants, other than the school board, must pay the plaintiff's costs of the action.

It is not necessary that I should deal with any of the other questions raised. The defendants, the school board, are not styled in the proceedings by their proper corporate name; the plaintiff may, and should amend this. See section 97 of the Act of 1891. The proper name of the corporation is "The Fort William Public School Board."

Judgment.

Street, J.

A. H. F. L.

[CHANCERY DIVISION.]

IN RE PARKER—PARKER V. PARKER.

Mortgage—Interest—R. S. C. ch. 127, sec. 7—Mortgage to Secure Part of Purchase Money—Special Contract.

Under a mortgage given to secure the balance of purchase money, and in which the principal is payable by instalments extending beyond five years, the mortgagor is, at any time after such last named period, entitled to a discharge under section 7 of R. S. C. ch. 127, an Act respecting Interest, upon payment of the principal and interest together with three months' additional interest.

WILLIAM JOHN MOORE, the purchaser of the lands in question in this administration proceeding, made a mortgage upon such lands to the accountant of the Supreme Court of Judicature for Ontario, dated 14th April, 1886, to secure the sum of \$3,600, a part of his purchase money. The mortgage was for the benefit of the infant defendants. The mortgage deed provided for payment of interest and for payment of the principal by yearly instalments of \$300 until the whole should be paid, the payments thus extending over a period of twelve years.

Statement.

By section 7 of R. S. C. ch. 127, an Act respecting interest, it is provided as follows:

"Whenever any principal money or interest secured by mortgage of real estate is not, under the terms of the mortgage, payable till a time more than five years after the date of the mortgage, then, if, at any time after the

Statement. expiration of such five years, any person liable to pay or entitled to redeem the mortgage tenders or pays, to the person entitled to receive the money, the amount due for principal money and interest to the time of payment, as calculated under the four sections next preceding, together with three months' further interest in lieu of notice, no further interest shall be chargeable, payable or recoverable at any time thereafter on the principal money or interest due under the mortgage."

The mortgagor, taking advantage of this provision, at a time when the mortgage had still more than four years to run, paid into Court all principal and interest due under the mortgage, together with three months' interest in advance, and moved for an order directing the accountant to discharge the mortgage.

The Master in Chambers referred the motion to a Judge, and it was argued before ARMOUR, C. J., in Chambers, on the 5th February, 1894.

James Kerr, for the applicant.

F. W. Harcourt, for the official guardian representing the infant defendants, contended that, as the mortgage was for part of the purchase money, and was made in pursuance of a special agreement, which was to the advantage of the mortgagor, the section above quoted did not apply.

February 5, 1894. ARMOUR, C. J. :—

There is no such distinction in the statute as that sought to be drawn, and the applicants are entitled to have the mortgage discharged. The applicant must pay his own costs and those of the guardian.

G. F. H.

[COMMON PLEAS DIVISION.]

NUNN V. BRANDON.

Evidence—Libel—Publication—Defendant Claiming Privilege—Tendency to Criminate—Misdirection.

In an action for libel, it was claimed that the defendant had, as a correspondent at T. of a newspaper, furnished several items which included one reflecting on the plaintiff. In his examination for discovery, defendant, while admitting he was a correspondent at T. could not say whether he was the only one; and alleged that he did not remember sending any of the items; but might possibly have sent some of them; but he did not think he had sent the one complained of; that he had had since the publication an interview with the editor with reference thereto, but he refused to answer whether he had discussed the item complained of, for fear, as he said, of incriminating himself. At the trial he stated he had since ascertained that there were other correspondents at T., and on being pressed as to the item complained of, after some hesitation, said he did not furnish it. No other evidence was given connecting the defendant with the publication:—

Held, that this did not constitute any evidence of publication to go to the jury.

The trial Judge in his charge, after referring to the defendant's refusal to answer on his examination for discovery, and to his reason for refusing, told the jury that they might draw the inference as to what the true answer would have been:—

Held, misdirection, and that no inference adverse to the defendant should have been drawn from his refusal to answer.

THIS was an action for libel, tried before ROSE, J., and Statement.
a jury at St. Thomas, at the Autumn Assizes of 1892.

The charge was the publication by the defendant in "The Star," a weekly newspaper published in the village of Springfield, in the county of Elgin, of the following libel:—

"The rumor is current that a well-known auctioneer is actively engaged in the farm pupil business. We hope he will be content with fleecing and not killing any of the green Englishmen whom he is importing. We do not want any second edition of Burchell in this country." Innuendo, "Meaning thereby that the plaintiff is engaged in the disreputable and unlawful business for pay of inducing by false pretences young Englishmen with money to come to this country from England on the promise to provide them with good homes and to learn farming, and thereby expecting from them money, and that he

Statement. may, if necessary, to conceal his nefarious and disreputable business, take their lives as Burchell did that of Benwell recently, the plaintiff, having at the time of the publication of the said defamatory statement, in his service a Mr. Pope, a young Englishman recently from England, who was living with the plaintiff learning the trade and business of an auctioneer."

The office from which "The Star" was published was in Springfield, but the type was set and the paper printed in Tilsonburg. The defendant, it was contended by the plaintiff, had been a correspondent of the newspaper at St. Thomas on four or five occasions; his communications being sent to Springfield, and appearing under the head, it was stated, of "St. Thomas News."

The libel complained of appeared in the issue of "The Star" of the 31st of March, 1892, and was filed as an exhibit at the trial.

The communication of the 31st March, contained seven items, the libel complained of being the last item.

The defendant on his examination for discovery, part of which was put in at the trial, and which is summarized in the judgment of the trial Judge, said: "I discussed some items in the paper with him" referring to an interview he had had with the editor. "Q. What did you discuss about it? A. I refuse to answer for fear of incriminating myself." His counsel at the trial as the last question was read, interposed and said: "I object to that last question and answer. I take the objection that a mere refusal to answer cannot be read against him," but the objection was overruled.

The manuscript was not produced or proved.

The editor of the paper was called as a witness for the plaintiff, and stated that the defendant was the only correspondent in St. Thomas they knew: that the manuscript sent to the printer at Tilsonburg was not always the manuscript received by him, as he sometimes sent his copy and sometimes the original.

Witnesses were called with the object of connecting the

defendant with the publication, but their evidence failed to do so. A witness named Jackson, was called with a view of shewing that the plaintiff was the person referred to in the libel; but the learned Judge held that until publication was proved, the evidence was of no avail. Statement

The plaintiff then called the defendant as a witness. In answer to questions put to him by the plaintiff's counsel, he said that he had at the request of the editor, Mr. Wilton, contributed items to a paper called "The Star," up to the 31st March, 1892, and perhaps after; that since his examination for discovery, he had ascertained that he was not the sole correspondent at St. Thomas. The witness was then asked whether he was the writer of the items complained of. This was objected to as not being admissible until the original newspaper was produced or accounted for, but the learned Judge overruled the objection and allowed the question to be put. The defendant said he could not positively say whether he had written any of the items. As to the 7th item, the one complained of, he said, "I thought I did not send it. I don't think so now. I did not send it."

The defendant's counsel moved for a nonsuit, on the ground that there was no evidence of publication to go to the jury.

The learned Judge allowed the case to go to the jury, but reserved his decision on the motion for the nonsuit, intimating that from the defendant's refusal to answer on his examination for discovery before the trial, on the ground that his answer might incriminate him, an inference might be raised as to what the true answer would have been, and he so charged the jury.

The learned Judge subsequently delivered the following judgment:—

September 13th, 1892. ROSE, J.:—

It seems to me there was evidence to go to the jury. There was evidence upon which the jury might well find that the defendant was the only correspondent at St.

Judgment.

Rose, J.

Thomas of the newspaper the "Springfield Star," and that about the time the article in question appeared, he sent correspondence to the editor of the newspaper.

Upon the article in question being produced to the defendant, in his examination for discovery, he practically admitted writing the greater portion of it.

The article was divided into paragraphs or items.

As to number one and two in answers to questions, he replied that he could not say if he did or did not communicate them ; that he might have written item No. 3 ; would not swear as to item No. 4 ; was not positive, might have communicated item No. 5 ; would not swear that he did not communicate item No. 6. As to item No. 7, which is the item in question, he at the trial gave the following peculiar answer—"I thought I didn't send it. I don't think so now ; I didn't send it."

This answer was given in reply to a question based upon his answers in his examination for discovery, and upon being pressed as to having only gone to the length of saying that he didn't think so when he was upon examination for discovery he answered as follows :—"I say, following your expression, what I said in my evidence that "I don't think so," "I didn't send it, I can say that I did not send that item." Being further pressed he said that he gave the answer "I don't think I wrote item No. 7," on the advice of counsel ; that the advice of his counsel affected his testimony to the extent that he did not make his answer as positive as otherwise he would have done ; that he hadn't time to think ; that his counsel knew as much about the sending of the item as he did, and that on his counsel's advice he refused to answer. On his examination for discovery more specifically as to item No. 7, he further admitted that he had written to Mr. Wilton the manager of the newspaper to whom he had sent the contributions to come up to St. Thomas as "there was a racket about some things in his paper which I didn't understand, and he came up in response to that letter I suppose." He said he was too busy to come at once and he came a few

days afterward. "I talked to him about these items in the paper; I didn't have the paper at the time. I discussed item No. 7 with him." It further appeared that any correspondence received from the defendant in the ordinary course went through the office and into the printer's hands and appeared in the newspaper.

It was perfectly manifest to my mind, and I think apparent to every one in the court room listening to the giving of the evidence, that the defendant before he gave a denial to the charge of having published or caused to be published the article in question was compelled to "screw his courage to the sticking point." He was manifestly under very great nerve pressure and his manner of giving the answer was such, I think, as to lead those who listened to him to believe that he was telling a falsehood.

Having regard to the fact that there was evidence to shew that the defendant was the only correspondent of this newspaper in St. Thomas; that about the time in question, he did send correspondence from St. Thomas to the paper, that in the ordinary course such correspondence would appear; that upon being shewn the article in question, he practically admitted the authorship of nearly every item in it; that when first examined as to the item in question, he did not in express terms deny his authorship, but gave a qualified answer; that he explained at the trial the want of positiveness in his answer as arising from the advice of counsel and from want of time to think; the manner of the giving of his answers at the trial and the language employed by him in giving of such answers, it seems to me that there was evidence to go to a jury, and upon which they were quite justified in finding as a fact that the defendant was the author of the article in question and cause of publication.

I do not understand that there is any technical difficulty from the nonproduction of the manuscript. It is manifest, and was not denied by Mr. Nesbitt, that, if the newspaper containing the article in question had been handed to the defendant, and he had in express terms admitted the

Judgment.

Rose, J.

Judgment. authorship of the article, and that he caused its publication, such evidence would be sufficient.
Rose, J.

I think the evidence I have summarized, was in effect an admission, or might be fairly construed as an admission of the authorship and publication.

This is entirely apart from the question that was raised at the trial, and in respect to which I charged the jury as to the effect of claiming privilege and refusing to answer. I have indicated my opinion on such point in *Harkins v. Doney*, 17 O. R. 21, at p. 28, and I refer to the authorities there cited, and to the argument contained in the foot note to *Rose v. Blackmore*, Ry. & M. 382. The section of Taylor on Evidence, there referred to should be 1453, *et seq.*

When a witness claims privilege from answering on the ground that his answer might render him liable to a criminal charge, he has to state such facts and circumstances to the Judge as will enable him to determine whether or not the claim is based upon any reasonable apprehension of danger. The question may be asked, and if privilege be not claimed by the witness, the answer is good evidence. If the privilege is claimed, the Judge upon hearing the ground upon which the witness bases his claim, determines as to whether or not the privilege exists. If the witness is declared entitled to the privilege, then his refusal to answer is sustained. All this takes place before the jury. Now there can be no danger in a case of this kind to the witness if, as a matter of fact, he neither wrote nor published, nor caused to be written or published, the article complained of. If he did write or publish it, then his answer by way of admission used in support of a criminal charge, might subject him to punishment; if he did not write or publish it, of course he could simply say so, and that would be the end of the matter. The privilege is not a privilege from answering so as to save him from the effect of such answer in a civil proceeding. Quite the contrary, because the fact may be shewn otherwise, if privilege is claimed. The privilege is to save him from giv-

ing testimony by confession, which might be used against him in a criminal proceeding. As long as that privilege is accorded to him, it seems to me he cannot claim more. He will be fully protected if he is not compelled to answer, because then there is no evidence which can be used against him in a criminal proceeding. The inference that others may draw from his silence is not evidence.

Apart from the question of privilege, if the witness upon being asked whether he was or was not the author of the article in question, should reply: "I will not tell you, because if I speak the truth it will prejudice me," he could not complain if the jury reasoned thus: "If you are an honest man you would answer and say, 'I did' or 'I did not.'" Your refusal to answer must be because you have something to conceal. The only fact that you have to conceal that would be to your own detriment, would be the fact of the authorship, therefore, when you refuse to answer, we will conclude that you are the author.

I take it that in every case that comes before a jury, any refusal to answer by a witness or a party in the witness box, coupled with his manner and the surrounding circumstances, often leads the mind to conclude that the refusal to answer is in effect an admission of guilt. Indeed, I know of no rule which prevents a Judge or a jury from believing that a positive denial is untrue, and that the fact is exactly contrary to what the witness says. If, upon a question being put, a witness hesitates, shuffles, shews a distressed manner, gives a qualified answer, "thinks," "is not sure," "believes," says "as far as I can remember," and the like, and then after such expressions, with a manifest nervous effort, says positively, "No, I did not do the act you charge me with," would any one hesitate to believe that he did do the act; that his denial was a falsehood, and that the truth was to the contrary?

Believing as I do, that a witness will obtain the full benefit of any privilege which the law grants to him from being compelled to answer questions which might subject him to criminal prosecution or to punishment by not being

Judgment.

Rose, J.

Judgment. compelled to answer the question, but leaving his conduct
Rose, J. to a fair inference in civil proceedings from his refusal to answer, I think that the fact of refusal to answer, is something which cannot be withdrawn from the jury; is something, which, if the case is allowed to go to them, will affect their minds.

I cannot rule in the defendant's favour that the refusal to answer was not evidence in this case which added to the other testimony, made a case for the jury. As I have said, apart from such evidence, I think there was evidence to go to the jury.

The defendant moved on notice to set aside the judgment entered for the plaintiff, and to have the judgment entered in his favour; or for a new trial on the ground of misdirection of the trial Judge in telling the jury that they might from the fact that the defendant refused to answer a question put to him draw an inference as to what the true answer would have been.

In Easter Sittings, 1893, before a Divisional Court composed of GALT, C. J., and MACMAHON, J., *Wallace Nesbitt* and *McKay* supported the motion.

G. H. Watson, Q. C., contra.

The arguments and cases referred to sufficiently appear from the judgments.

June 24, 1893. MACMAHON, J. :—

I quite agree with my learned brother who tried this case, that if the newspaper containing the article complained of had been handed to the defendant and he had admitted the authorship of the article and had caused its publication, such evidence would have been sufficient, and no difficulty could have arisen from the non-production of the manuscript. Then has there been in this case such an admission by the defendant? When the objection was made

by Mr. Nesbitt while Jackson was in the box, that there was no proof of publication by the defendant, my learned brother Rose held that the defendant had not been connected with the publication, and counsel for plaintiff admitted that such was the case, replying that the evidence of publication was not at hand at the moment, but that he intended to offer other evidence of publication.

Judgment.
MacMahon,
J.

The only other evidence of publication was that by the plaintiff calling the defendant as his witness.

The defendant does not in his evidence at the trial admit he was the author of item 7. On the contrary, he says he did not write it, and that since his examination for discovery he had ascertained that other persons in St. Thomas corresponded for, or sent news items to the "Star." It is, therefore, essential, where there was this unequivocal denial of authorship, that the manuscript should have been produced, or its loss or destruction accounted for, and evidence given that the manuscript was in the defendant's handwriting, or that he procured it to be written, and that what appeared in the newspaper was substantially that which was contained in the manuscript furnished.

A person confronted with a newspaper and asked if he was the author of the several items therein might honestly say "I corresponded with that paper and as to some of the items I have a recollection and as to the others I cannot say that I wrote them," for the omission or addition of a line or a few words might completely change the sense.

While Wilton states the defendant was the only correspondent in St. Thomas they knew, he did not say anything as to the items being received all at one time, nor did he state that this item 7 was in defendant's handwriting. What Wilton sent to the printer at Tilsonburg was not always the manuscript received by him. He said, "sometimes I forwarded my copy and sometimes the original." There was no evidence of loss or destruction to let in secondary evidence. So that unless there was a positive admission by the defendant, of publication by him of that item, there was nothing I conceive, which should have been

Judgment.

MacMahon,
J.

submitted to the jury as to it. The necessity existing for the production of the manuscript in this case is apparent on the authority of *Adams v. Kelly R. & M.*, 158 cited in *Odgers Libel and Slander*, 2nd ed., 156, and *Folkard on Libel and Slander*, 5th ed., 454.

Then, coming to the question raised as to the effect of the refusal by the defendant to answer the question put to him on his examination for discovery as to this item 7, upon the ground that it might tend to criminate him. This is an important point in view of the opinion entertained by my brother Rose, when the motion for non-suit was being discussed, as well as in his charge to the jury.

The witness must himself declare on oath, that he believes that if compelled to answer the question it may, or might, tend to criminate him, and it is for the Court to determine whether the answer can criminate him. The defendant was under oath when he claimed the privilege of silence, and the question asked, with the ground for declining to answer was put in by the plaintiff's counsel as part of his case, and it rested there. It is, then, so far as the plaintiff is concerned, the same as if the defendant while in the box had declined to answer, upon the ground stated, and the Judge had passed upon the question as to the right of the defendant to decline to answer.

The present case, like *Lamb v. Munster*, 10 Q. B. D., 110, at p. 112, is where, as said by Field, L. J., "the tendency of the answer is to criminate." See, also, *Regina v. Boyes*, 1 B. & S. 311, 312; *Ex p. Schofield*, 6 Ch. D. 230; *Ex p. Reynolds*, 20 Ch. D. 294.

Assuming, as we now must, that the answer would tend to criminate, then what effect should it have had on the question to be submitted to the jury as to whether the defendant published the libel complained of?

In *Lloyd v. Passingham*, 16 Ves. at p. 64, Lord Chancellor Eldon, said: "I protest strongly against the doctrine that Robert Passingham, having demurred to so much of the bill as seeks a discovery of facts, which have a tendency to affect him criminally, is on that account to be

considered as admitting the allegations in the bill ; having observed a notion prevailing lately that a witness who refuses to answer a question upon that ground, is, therefore, not to be believed. Nothing can be more fallacious as a standard of credit than such a conclusion ; or more dangerous to justice by depriving the subject of that protection to which he is entitled by law ; and the practice formerly was that the Judge told the witness he was not bound to answer the question."

Judgment.
MacMahon,
J.

So in *Rose v. Blackmore*, R. & M. 384, where a witness refused to answer a question whether he had published a particular handbill, on the ground that he had been threatened with a prosecution for the publication, Brougham, in addressing the jury for the plaintiff, put it to them that the witness really must have been concerned in the publication, for that a denial of it, if he could deny it, would not injure him. Lord Chief Justice Abbott interposed and said : " That no such inference should be drawn ; that there was an end of the protection of a witness " if a demurrer to the question were to be taken as an admission of the fact inquired into."

The opinion expressed by Lord Eldon in 1808, in 16 Ves., and by Abbott, C. J., in 1817, in R. & M., was the view entertained by Lord Romilly, M. R., as late as 1864, in *Wentworth v. Lloyd*, 10 H. L. at p. 590, where he says : " I wish to distinguish between the case of the suppression of evidence by a witness and the case where he declines to answer the question on the ground that he is not bound to criminate himself, in which case no presumption of guilt can be fairly drawn from the refusal to answer or the privilege would be at once destroyed."

This is also the opinion of the Superior Court of Pennsylvania in *Phelin v. Kenkerdine*, 20 Pa. Sup. Ct. 354, where at p. 363, the Court says : " If the privilege claimed by the witness be allowed, the matter is at an end. The claim of privilege and its allowance is properly no part of the evidence submitted to the jury, and no inferences whatever can be legitimately drawn by them from the

Judgment. legal assertion by the witness of his constitutional right.
MacMahon, J. The allowance of the privilege would be a mockery of justice if either party is to be affected injuriously by it." The judgment of the Supreme Court of Michigan, in *Carne v. Litchfield*, 2 Mich. 340, is equally emphatic in support of the English authorities above cited.

The question is one of much importance, and after what diligence I was able to use in my quest for authorities, I consider the correct rule, and the one by which I should feel myself individually bound—is contained in the cases to which reference has been made.

I have been somewhat solicitous in regard to this point, because of the view entertained by my learned brother Rose, in consequence of a note to the case of *Rose v. Blackmore*, R. & M. at pp. 384, 385. That is a note by the editors of the Report, and I observe that a synopsis of such note has crept into the text of Taylor on Evidence, section 1464, and appears to have so much influenced the learned author that while not quoting it as an authority, he seems to regard it as unsettling what had before been the rule. However, having regard to the authorities to which I have referred in support of the rule, that no inference should, or can be drawn from the refusal to answer a question which the law says the witness is privileged from answering, I should not allow the editor's note to *Rose v. Blackmore*, to influence me in my judgment.

The learned Judge in his charge to the jury, dealing with a particular piece of evidence, said: "If he told the truth, then some of these items that are in the article were written by him and sent by him from St. Thomas to this paper for publication, and were published in accordance with his instructions or in accordance with his wish. As to some of them, and as to this item, he speaks indefinitely. He says he did not know, he did not think, and then declines to answer as to the authority of that article because it might incriminate him. * * And when a man is charged with speaking or writing words of another, he either ought to affirm at once that he wrote these

words or deny it, and so bring the matter to such an issue as the truth will decide. And, therefore, when a man says I decline to tell you whether I wrote certain words because the answer may incriminate me, I will leave it to the jury until I am governed by authority which will control me, I shall always leave it to the jury to say what the fair meaning of those words is. He says I cannot tell you that I wrote these words, because if I did tell you that I wrote those words, I would be liable to criminal proceedings. The law states that a man is not bound to make any answer which will make him liable to criminal proceedings. By a tenderness on the part of the British law,—it is not always so in other countries,—a man cannot be obliged to admit his own guilt. How can the defendant's answer injure him if the truth is that he is not guilty? If the truth is that he is guilty, then he may decline to answer so that out of his own mouth the evidence will not be furnished which will render him liable to criminal proceedings. If he is not guilty, the simple answer is, I did not do it, and that answer cannot subject him to criminal proceedings. The jury in a civil case may say we can only take one fair meaning from your answer if you won't answer; that is, if you did answer, you would be subject to criminal proceedings, and if subject to criminal proceedings, it would only be an admission of guilt. I shall leave it to you to say on the evidence whether or not you believe he wrote that article and forwarded it to be published, and for you as to whether you will accept his statement made on examination for discovery as tending to that conclusion, coupled with the evidence of Wilton; or whether you will accept his denial to-day, given as it was, given in the manner it was given and prefaced by the other answer he did give. What you and I are here for is to seek out the truth, as far as we know it, and the impression that is left upon the mind is truth for you."

Without the evidence for which the plaintiff claimed privilege, there was not, I conceive, evidence to go to the jury of publication by the defendant. Holding that view,

Judgment.

MacMahon,
J.

Judgment. and from what I have already stated, that no inference
MacMahon, adverse to the defendant, should have been drawn from
J. his not answering the question, I think there was misdirection in the charge of the learned Judge, and that the verdict and judgment must be set aside and a new trial ordered without costs.

G. F. H.

GALT, C. J., concurred.

[COMMON PLEAS DIVISION.]

WILSON V. FLEMING.

Covenant—Dependent or Independent—Mortgage.

The proviso for payment in a mortgage made by defendant was that the mortgage was to be void on payment of \$3250 and interest. Then followed the usual printed short form covenant for payment, to which was added in writing the words, "but before proceeding upon the covenant the mortgagee shall realize upon the lands mortgaged, and that the mortgagor shall then be liable only to the amount of \$600, or such lesser sum as will with the net proceeds from the lands make the \$3250 and interest." The last clause in the mortgage, also added in writing, was that "in no event shall the personal liability of the mortgagor on his covenant exceed \$600":—

Held, that the defendant was not to be subject to any liability until the lands were realized upon and the result shewed a deficiency, and then only to the extent of \$600.

Statement. THIS was an action tried before Meredith, J., at Chatham, at the Autumn Chancery Sittings of 1893.

The action was brought to recover the sum of \$600, alleged to be due under a covenant contained in a mortgage made by the defendant in favour of the plaintiff.

The mortgage was dated 24th July, 1888, and was to secure payment of \$3,250 and interest at the rate specified in the mortgage. The defeasance clause provided for the mortgage being void on the payment of the principal sum of \$3,250 in one year from the date thereof, with

interest at the rate specified therein, etc. Then followed Statement.
the usual printed covenant for payment, namely :

“ The said mortgagor, covenants with the said mortgagee, that the mortgagor will pay the mortgage money and interest, and observe the above proviso,” to which was added in writing the following words : “ but before proceeding upon this covenant, the mortgagee shall realize upon the lands mortgaged, and the mortgagor shall then be liable only to the amount of \$600, or such lesser sum as will with the net proceeds from the lands make \$3,250 and interest.”

The last clause in the mortgage, also added in writing, provided, that “ in no event shall the personal liability of the mortgagor on his covenant exceed \$600.”

The evidence shewed that the lands had not yet been sold.

The question turned upon the effect of the covenant.

The learned Judge reserved his decision, and, subsequently, delivered the following judgment.

November 6, 1893. MEREDITH, J. :—

This contest has doubtless been caused by the attempt of the parties to adapt to their real agreement the printed words of the covenant to pay the mortgage moneys and interest, contained in the usual printed forms of mortgages, intended to embody the statutable short forms, by addition to or alteration of the printed form. A course that has created, and must create, difficulties in many cases.

One cannot doubt, that, had there been no printed form, the covenant would have assumed a different shape, and, perhaps, have left no good excuse for this litigation.

That the long form, containing the covenant to pay the sum of money in the proviso mentioned (\$3,250), cannot be applicable is obvious, for, in the added words, it is said, that the mortgagor shall “ be liable only to the amount of \$600, or such lesser sum as will with the net proceeds from the lands make \$3,250 and interest ; ” and the last clause in

Judgment. the mortgage, also added in writing, states, that "in no event shall the personal liability of the mortgagor on his covenant exceed \$600." Neither is it applicable as to the days and times and manner limited in the proviso for payment, for the added words state, that "before proceeding upon this covenant the mortgagee shall realize upon the lands mortgaged." The added words cannot be treated as express exceptions from, or qualifications of, the short form of words, which can be likewise made from, or in, the long form; but effect can be given to the covenant apart from the Act: see *Brown v. O'Dwyer*, 35 U. C. R. 354, and *McKay v. McKay*, 31 C. P. 1.

Meredith, J.

But whether the covenant took effect under the Act, or is to be construed according to its very words only, the result must, in my opinion, be the same, for the intention of the parties, to be gathered from the words they have used, in either case surely is, that there is to be no liability until the lands have been "realized upon," and the result shews a deficiency; and then only a liability to the extent of such deficiency or the \$600, whichever may be the lesser sum.

The plaintiff has not "realized upon the land;" he does not allege that he has: it rests largely with him when and how that shall be done; but, till then, the liability upon the covenant is not ascertained, and is not to be resorted to.

The added words are not an independent covenant upon the part of the mortgagee, the mortgagee has not, in fact, executed the mortgage. "But before proceeding upon this covenant" may well mean before claiming anything under it, before it comes into effect so as to make the mortgagor "personally liable" for any part of the mortgage debt.

The action is premature, and must be dismissed with costs, but with costs as of a successful demurrer to the statement of claim only, for the plaintiff's claim might as effectually have been defeated in that way as by going to the expense of a trial.

The plaintiff asks that the counter-claim be dismissed with costs; but there is no counter-claim duly pleaded—nothing to so dismiss.

The plaintiff moved on notice to set aside the judgment entered for the defendant and to have the judgment entered in his favour. Argument.

In Michaelmas Sittings, 1893, before a Divisional Court, composed of GALT, C. J., ROSE and MACMAHON, JJ. *E. D. Armour*, Q. C., supported the motion. The covenants are independent covenants. If the defendant is damnified, his remedy must be by an action on his cross covenant or by way of counter-claim. The case comes within the first rule laid down in *Pordage v. Cole*, 1 Wm. Saund. 548, at p. 551, namely, "If a day is appointed for the payment of money," etc., "and the day is to happen, or may happen, before the thing which is the consideration of the money," etc., "is to be performed, an action may be brought for the money," etc., "before performance; for it appears that the parties relied upon his remedy and did not intend to make the performance a condition precedent; and so it is where no time is fixed for performance of that which is the consideration of the money or other act." There is a distinction between this case and a covenant only to be called on to pay in case of deficiency: *McDonald v. Murray*, 11 A. R. 101; *Moor v. Roberts*, 3 C. B. N. S. 830; *Smith v. Cooke*, [1891] A. C. 297; *Mattock v. Kinglake*, 10 A. & E. 50; *Leith's Real Property*, 2nd ed., 373. The meaning of the word "realized" is discussed in *Re Oxford Building Society*, 35 Ch. D. 502.

W. Douglas, Q. C., contra. The covenants are dependent covenants, and taken together amount to a covenant to pay only in case of a deficiency. The dependence or independence of covenants is to be collected from the evident sense and meaning of the parties. There can be no doubt but that the intention to be gathered from the covenants was, that the property was to be sold before any liability should arise: *Moor v. Roberts*, 3 C. B. N. S. 830; *Lady Emily Foley v. Fletcher*, 3 H. & N. 769; Addison on Contracts, 9th ed., 51-2; *McKay v. Howard*, 6 O. R. 135; *Clark v. Harvey*, 16 O. R. 159.

Judgment December 30th, 1893. GALT, C. J. :—

Galt, C.J.

The claim of the plaintiff was, as respects the defendant, personally limited to the sum of \$600. The paragraph in the mortgage in question in this action is as follows :

“ The said mortgagor covenants with the said mortgagee, that the mortgagor will pay the mortgage money and interest and observe the above proviso ” (These words are in the printed form. Then follows the following written stipulation) “ but before proceeding upon this covenant, the mortgagee shall realize upon the lands mortgaged, and the mortgagor shall then be liable only to the amount of \$600, or such lesser sum as will with the net proceeds from the lands make \$3,250 and interest.”

The mortgagee accepted the mortgage with this express stipulation ; the lands have not been sold ; and I fully concur in the opinion of my learned brother that this action is premature.

The motion must be dismissed with costs.

ROSE, J. :—

When counsel for the plaintiff admitted that the defendant was not, under the terms of the mortgage, liable for more than \$600, it seems to me that he admitted too much or too little, for if the covenant to pay the mortgage money and interest is qualified so as to limit the liability to \$600, then the limitation found in the following words applies, and the liability is limited to \$600 “ or such lesser sum as will with the net proceeds from the lands make \$3,250 and interest.”

The whole manuscript clause seems to me to mean, that before proceeding on the covenant to pay the mortgagee is to realize upon the lands mortgaged, and that the mortgagor shall then, that is, after the realization, be liable to pay the deficiency to the extent of, that is not exceeding \$600.

The amount which the mortgagor is thus permitted to

require the mortgagee to pay cannot be ascertained until after the "net proceeds from the lands" have been ascertained, which will be after realization, *i. e.*, sale of the mortgaged lands.

Judgment.

Rose, J.

I agree in thinking the action premature and the judgment right.

MACMAHON, J.:—

The second rule in the notes to *Cutter v. Powell*, 2 Sm. L. C. (9th ed.), p. 15, is "when a day is appointed for the payment of money," etc., "and the day is to happen *after* the thing which is the consideration of the money, etc., is to be performed, no action can be commenced for the money, etc., before performance."

The best illustration of what this rule means is afforded by a case very analogous to the present. In *Moor v. Roberts*, 3 C. B. N. S. 830, an action was brought upon a guarantee given by defendants, whereby they undertook, that, if after any sale of certain property the purchase money should not be sufficient to satisfy the sum of £1,200 which had been advanced on mortgage, and all interest, etc., they would immediately thereafter make good and pay to the plaintiff such deficiency.

The premises were put up for sale and knocked down at much less than the amount of the mortgage, but the purchaser afterwards declined to complete the purchase, and an action was pending against him at the time the plaintiff sued the defendants upon their guarantee. It was held the latter action was premature. Cockburn, C. J., said at p. 841: "The question turns upon the construction of the word 'sale' in that instrument. I am clearly of opinion, that, taken in conjunction with the rest of the document, it means a *completed* sale. If not, it is obvious the plaintiff might treat the sale as incomplete (as, indeed, he has done), and bring an action against the vendee, and having recovered damages against him for his breach of contract, put the property up to

Judgment. sale again, and perhaps realize more than the amount of
MacMahon, the charge upon it; or, he might compromise with the
J. vendee, and resell. The amount of the deficiency which the defendants were to make good could only be ascertained by a complete sale and realization of the price."

And Williams, J., says: "The word 'sale' in the guarantee must mean such a sale as that the proceeds shall be realized, otherwise there are no means of measuring the damages the plaintiff is entitled to recover against the present defendants."

This authority is quite conclusive against the plaintiff's contention. The proviso in the mortgage is "but before proceeding on this covenant, the mortgagee shall realize upon the lands mortgaged," etc. The right of action does not accrue until there is a realization, and there can be no realization without a sale.

I agree that the motion must be dismissed with costs.

G. F. H.

[CHANCERY DIVISION.]

RE STEPHENSON.

KINNEE ET AL. V. MALLOY ET AL.

*Executors and Administrators—Will—Blended Fund—Power of Sale—
Executor of Surviving Executor.*

A testator by his will directed his real and personal property to be sold and the proceeds to be divided and distributed, and appointed two executors to carry out his will, both of whom died before the estate was realized :—

Held, that the executor of the last surviving executor of the testator's will had power to sell and convey the lands.

THIS was an appeal from a finding of an Official Referee. Statement.

In making title to a piece of land through the will of one John Stephenson, dated the 28th July, 1865, who died on September 17, 1872, the material parts of which were as follows :—“ I will and desire that the whole of my real and personal estate be sold, and the money be divided into three parts, and distributed as follows * * * . Further, I appoint Thomas Armstrong and Isaac Murray to see this my last will and testament faithfully carried out,” it appeared that Thomas Armstrong died, leaving Isaac Murray surviving executor, and that then Isaac Murray died having made a will appointing three executors, one of whom renounced, and one of whom died, leaving one Alexander Malloy the surviving executor of Isaac Murray's will.

The referee found as follows :—“ That the said executor Alexander Malloy * * has no power to make a sale and conveyance of the said lands, but that pursuant to R. S. O. ch. 110, sec. 3, he is entitled to appoint a new trustee or trustees who can execute the power and trusts of the will of the said John Stephenson.”

From this finding the vendor appealed, and the appeal was argued on January 23rd, 1894, before BOYD, C.

Argument.

Hodge, for the vendor. The surviving executor is the proper party to convey. There is no discretion vested in the executors, there is merely the power to make a sale which passes to the *executor* of the *executor*; Williams on Executors, 9th ed., 829; Sugden on Powers, 8th ed., 116.

W. Cook, for the purchaser. The power to the executors here to sell is coupled with the power to distribute. When there is an express trust, and the surviving trustee dies, the heir-at-law is the proper party to convey, or a new trustee must be appointed: *Cooke v. Crawford*, 13 Sim. 91; *In re Morton and Hallett*, 15 Ch. D. 143; *In re Cunningham and Frayling*, [1891] 2 Ch. 567; Powell on Devises, 242, 243.

January 29th, 1894. BOYD, C.:—

The testator in this case directs both real and personal property to be sold and the money divided. He appoints Armstrong and Murray to carry out his will, and he names them as his executors. There is thus a blending of real and personal estate for the purposes of sale and distribution, and the two persons named are clearly so named as executors.

I think in this case where land and personalty are both to be dealt with in the same way and by the same persons as executors, that the death of one does not disqualify the survivor in whom the whole executorial character vests, and that this surviving executor can transmit the power to his executor, and thus preserve the chain of representation.

In the case of land *simpliciter* authorities and opinions are divided, but in the case of a blended estate, and having regard also to the course of legislation in Ontario (R. S. O. ch. 110), I think the better opinion is to hold in favour of the transmission of the power by survivorship and representation by subsequent executors of those originally named: Farwell on Powers, 2nd ed., pp. 92, 93; Williams on Executors, 9th ed., 830, 831; see also Anon. 3 Dyer,

371 b (3), cited in *Robinson v. Lowater*, 5 D. M. & G. at p. 277; *In re Fisher and Hazlett*, 13 L. R. 1r. 546 (1884), and *Re Ford*, 15 C. L. J. N. S. 108. Judgment.
Boyd, C.

In the result I hold that title can be made by the executor now before the Court—being the representative of the last surviving executor of the testator's will.

G. A. B.

[CHANCERY DIVISION.]

RE BAJUS.

Payment—Payment into Court—Benevolent Society—Insurance Moneys—Conflicting Claims—O. J. A. sec. 53, sub-sec. 5.

On an application by a Benevolent Society for leave to pay insurance money into Court, claimed by different parties:—

Held, that sub-section 5 of section 53 of the Judicature Act extends the benefit of the Act for the relief of trustees to such cases, and that the society was entitled to pay the money in.

Decision of FERGUSON, J., reversed.

THIS was an appeal by a Benevolent Society from a Statement. judgment of FERGUSON, J., refusing permission to pay money due under a benefit certificate into Court which was claimed by more than one person.

One Philip Bajus had, on the 29th day of May, 1882, become a member of the Ancient Order of United Workmen of the Province of Ontario, and as such entitled to a benefit certificate for \$2,000, which was so issued that on his death that sum should be paid to his wife, Grace Bajus.

On the 11th day of April, 1885, he made his will, and by it made a different disposition of the proceeds of his policy or certificate, which he devised to his executors to invest, and pay the interest to his wife during her widowhood as therein provided, and died 15th February, 1893.

Statement. On his death his executors claimed the amount of the certificate under his will, and his widow also claimed it as the beneficiary named in the certificate.

The society then applied to the Master in Chambers for leave to pay the money into Court under 10 & 11 Vic. ch. 96 (Imp.), and the Master referred the matter to a Judge in Chambers.

The application was argued on November 20th, 1893, before FERGUSON, J.

Warren Totten, Q. C., for the motion.
Langton, Q. C., contra.

September, 26, 1893. FERGUSON, J. :—

I am of opinion that Mr. Langton's contention is correct. The certificate may be a trust; but the Association (The Ancient Order of United Workmen) are not, as far as I can perceive, trustees of the fund. They are, I think, simply debtors in respect of it.

Such being the case, they have not the right to pay the money into Court under the provisions of the Act under which the application is professedly made: see *Cleaver v. Mutual Reserve Fund Life Association*, [1892] 1 Q. B. 147.

The application should be dismissed with costs.

From this judgment the Order appealed to the Divisional Court, and the appeal was argued on December 7th, 1893, before BOYD, C., and ROBERTSON, J.

Totten, Q. C., for the appeal. The testator having taken out the certificate in favour of his wife, and then having apportioned the proceeds under R. S. O. ch. 136, sec. 6, two different parties claim the proceeds. The learned Judge held that the Order were mere debtors, and not trustees. That cannot be so; the contract was made with the testator who is now dead, and the money is held now for others.

The money is trust money, first held under the terms of the certificate, and then subject to variations under R. S. O. ch. 136, sec. 6. Such policy shall enure "and be deemed a trust," sec. 5. All the cases go to shew the money is trust money, and it should be paid into Court, and so obviate the risk of actions, by contending parties, being brought against the Order. The statute speaks of trustees, sections 12 and 13. See also *Scott v. Scott*, 20 O. R. 313; *Gandy v. Gandy*, 30 Ch. D. 57; *Swift v. The Provincial Provident Institution*, 17 A. R. 66; *Re O'Heron*, 11 P. R. 422; *In re Mellor's Policy Trusts*, 6 Ch. D. 127; 7 Ch. D. 200; *In re Adams' Policy Trusts*, 23 Ch. D. 525; *In re Seyton—Seyton v. Satterthwaite*, 34 Ch. D. 511; *Re Davies' Policy Trusts*, [1892] 1 Ch. D. 90; *Ex p. Hodgson*, 19 Ves. 205; *Mingeaud v. Packer*, 21 O. R. *per* Armour, C. J., at p. 275; 19 A. R. *per* Hagarty, C. J. O., and Burton, J. A., at p. 290; *Re Cameron, Mason v. Cameron*, 21 O. R. 634; *Campbell v. Dunn*, 22 O. R. 98, at p. 105; *Cleaver v. Mutual Reserve Fund Life Association*, [1892] 1 Q. B. 147.

G. M. Macdonell, Q. C., *contra*. The certificate was taken out in favour of the wife alone. The money must follow the direction of the certificate, and is not affected by the will. She could bring an action for it. At the time the will was made the statute in force allowing interference with the money was 47 Vic. ch. 20 (O.). There was no power to apportion where, as here, only one person, the wife, was interested. Apportionment could only be made where more than one person was interested. There was no power at that time to do what the will purported to do. By the Revised Statute ch. 136, sec. 6, he got a power of appointment which he never executed or availed himself of. Irrespective of the Act, the insurance was good for the benefit of the wife: *Wicksted v. Munro*, 13 A. R. 486. There was no trust here: *Matthew v. Northern Assurance Co.*, 9 Ch. D. 80.

Totten, Q. C., in reply.

Argument.

Judgment. January 22nd, 1894. BOYD, C. :—

Boyd, C.

The testator obtained, in 1882, a beneficiary certificate for \$2,000, payable at his death to his wife. Afterwards, in 1885, he made a will by which he directed the insurance moneys to be invested by his executors, and making a different disposition so that his children should participate with his wife. The conflicting claims arise by the widow claiming the whole as against the executors who claim under the will.

The application of the insurance association—the Ancient Order of United Workmen—to pay the fund for insurance in their hands into Court, is meritorious, as conflicting claims have been made upon it, and the opposition offered by the widow is singularly unmeritorious.

It is not needful to express an opinion: see *Cleaver v. Mutual Reserve Fund Life Association*, [1892] 1 Q. B. 147, upon who is entitled to the money as that is not before us; but unless better and saner counsels prevail the whole fund will be wasted in a struggle between the widow and her infants.

Happily I find myself at liberty to accede to the application to pay the money into Court upon a ground and for reasons not brought to the attention of my brother Ferguson, and not presented for our consideration.

The provisions of the Judicature Act, sec. 53, sub-sec. 5, extend the benefits of the Act for the relief of trustees to cases such as this. In cases of assignments of debts or choses in action, if the debtor is notified of opposing or conflicting claims to the amount in question, he may either interplead or pay the money into Court in conformity with the provisions of law for the relief of trustees. This settles the bitter contest simply, satisfactorily, conclusively.

I do not consider whether without this the insurance company might not still have claimed the benefit of the relief act as being a trustee within its meaning having regard to the trust character impressed upon the moneys by virtue of the statutes as to husbands assuring their

lives for wife and children; as to which consult *In re Judgment.*
Haycock's Policy, 1 Ch. D. 611; *Re Hall*, 10 W. R. 37. *Boyd, C.*

The insurance company are entitled to costs of motion and appeal. The widow should pay these, but has not, I suppose, means to do so, so that the fund will have to be diminished by the deduction of these costs.

ROBERTSON, J.:—

I think this appeal should be allowed, and concur in the judgment of the Chancellor.

G. A. B.

[CHANCERY DIVISION.]

NOXON v. NOXON.

Patent for Invention—Licensee—Right to Terminate License.

The defendants were licensees of a patent under an agreement whereby they had to pay certain royalties to the patentee, and in consideration thereof were empowered to manufacture the patented machine in question, to the end of the term of the letters patent. Subsequently the defendants became possessed of an undivided one-fourth interest in the patent, and they thereupon gave notice to the plaintiff, who was the holder of the patent and entitled to the benefit of the above agreement, that they would, after a day named, terminate the agreement and make no further payments for royalties, but would manufacture the machine in question as owners of an undivided one-fourth interest in the patent:—

Held, that the defendants were entitled so to do.

If an interest is transferred in a patent, then it requires the consent of both parties to put an end to the transfer; but if the transaction is merely permission on certain terms to invade the monopoly, then the licensee may, at his option, renounce the license and make the machine patented at his peril.

THIS was an action brought by James Noxon against *Statement.*
the Noxon Brothers Manufacturing Company, the plaintiff claiming as assignee of a certain patent granted to one Westcott for a seed distributor, to be entitled to collect from the defendants royalties under an agreement dated October 17th, 1877, which was in the following words:—

Statement.

" This agreement made this 17th day of October, 1877, between John McMahon Westcott, of the city of Milton, in the county of Wayne, in the State of Indiana, one of the United States of America, manufacturer, party of the first part, and Noxon Brothers Manufacturing Company, limited, of the town of Ingersoll, county of Oxford and Province of Ontario, party of the second part.

" WITNESSETH, that whereas letters patent of the Dominion of Canada for improvements in seeding machines, were granted to the party of the first part, dated May 15th, 1877, No. 7441; and whereas the party of the second part is desirous of manufacturing grain drills and seeders, containing one or more claims in said patent improvement; Now, therefore, the parties have agreed as follows:—

" 1st. The party of the first part hereby licenses and empowers the party of the second part to manufacture, subject to the conditions hereinafter named, at their factory, in the town of Ingersoll, county of Oxford, and Province of Ontario; and in no other place or places, to the end of the term for which said letters patent were granted, grain drills and seeders containing one or more claims of the patented improvement, and to sell the same within the Dominion of Canada.

" 2nd. The party of the second part agrees to make full and true returns to J. Westcott, verified as said party of the first part may desire on the 1st of January, A.D. 1879, of all drills or seeders, containing any of said patented improvements manufactured by the party of the second part, since the granting of said letters patent; and thereafter a like return for and during each year of the term of said patent, upon the 1st day of January of each year, of all drills or seeders containing any of the said patented improvements manufactured by the party since the last preceding return.

" 3rd. The party of the second part agrees to pay to the said party of the first part one dollar as a license fee upon every two horse drill or seeder manufactured and sold by said party of the second part containing any of the patented improvements.

"4th. Upon a failure of the party of the second part to make returns or to make payments of license fees as herein provided for thirty days, after the days herein named, the party of the first part may terminate this license by serving a written notice upon the party of the second part; but the party of the second part shall not thereby be discharged from any liability to the party of the first part for any license fees due at the time of service of said notice. Statement.

"In witness whereof the parties above-named, the said Noxon Brothers, Manufacturing Company, limited, by its president, have hereunto set their hands, the day and year above written."

The defendants contended, as set out in the fourth paragraph of their statement of defence as follows:—

"In the year 1887, while the defendants were licensees under the said agreement, they acquired, and they have ever since been and they still are the absolute owners for their own use of an undivided one-fourth interest in the patented invention embraced in the Canadian patent to the said J. M. Westcott, numbered 7441 in the said agreement mentioned, and in the said letters patent, which invention and patent are the subject of the license granted by the said agreement; and upon the acquisition of such undivided one-fourth interest in the said invention and patent, the defendants as they were entitled to do, gave notice to the plaintiff and other persons claiming to be entitled to the benefit of the said agreement, that the defendants would from and after the 31st day of December, 1887, terminate and put an end to the said agreement, and make no further payments thereunder, except for royalties earned prior to the last mentioned date, and would from and after that date, manufacture the machines embracing the said patented invention as owner of an undivided one-fourth interest in the said patented invention and letters patent and not as licensed."

It appeared that after the agreement of October 17th, 1877, by assignment of June 10th, 1882, Westcott assigned

Statement. the patent to the plaintiff. By assignment dated July 3rd, 1882, the plaintiff assigned to one Thomas Henry Noxon an undivided one-fourth part of all his right, title, and interest in the patent; by assignment of May 4th, 1887, Thomas H. Noxon assigned to the defendants his said one-fourth interest. Thereupon the defendants caused to be served upon James Noxon and Thomas Henry Noxon a notice dated November 23rd, 1887, notifying them that as the holders of and beneficiaries under the patent in question, being patent 7441, "all agreements respecting the manufacture of implements covered by the above named patent and extensions thereof, will be terminated and put an end to from and after the 31st day of December, 1887, and that from and after that date no further payments will be made under the agreement made by the company with Westcott for payment of royalties.

The case was tried on January 25th, 1894, before **BOYD C.**, at Toronto.

W. Cassels, Q. C., and *Anglin*, for the plaintiff. A license cannot be revoked by one party: *St. Paul Plow Works v. Starling*, 140 U. S. 184; *Steers v. Rogers*, [1893] A. C. 232.

B. B. Osler, Q. C., and *Arnoldi, Q. C.*, for the defendants. In the American case cited, there was a covenant to make and sell, which there is not here. We have no exclusive right, nor are we under any obligation to keep on making: *Wood v. Ledbitter*, 9 Jur. 187; *Kenny's Patent Button-Holeing Co. v. Somervell*, 38 L. J. N. S. 878; *Ward v. Livesey*, 5 Pat. Cas. R. 102; *Heap v. Hartley*, *ib.*, 603; *Robinson's Law of Patents*, vol. 2, secs. 815, 819 *n.* 820; *Marsh v. Dodge*, 4 Hun 278; *Gray v. Billington*, 21 C. P. 288; *Neilson's Patent*; *Webster's Patent Cas.*, vol. 1, at p. 290; *Frost's Laws of Patents*, p. 329. We had a right to terminate the agreement in the way we have done: *Clark v. Adie*, (No. 2), 2 A. C. 423; *Dangerfield v. Jones*, 13 L. T. N. S. 142; *Curtis' Law of Patents*, 4th ed., sec. 190; *Clum v. Brewer*, 2 Curtis' Cir. C. R. 506; *Mathers v. Green*, L. R. 1 Ch. 29.

Cassels, in reply.

January 27th, 1894. BOYD, C.:—

Judgment.

Boyd, C.

The instrument dated October 17th, 1877, is in my opinion no more than a license and does not operate so as to transfer any estate or interest in the letters patent by way of assignment or of grant and conveyance, as referred to in sec. 26, of the Patent Act, R. S. O. c. 61. Nor looking at its form is it more than an instrument in writing. It is not a deed though the licensees, the Company, execute it under their corporate seal for the purpose of manifesting their assent and liability to pay the royalties. Even if under the seal of the patentee it would be only a more solemn evidence of its authenticity, but not a deed in the ordinary sense: *Chanter v. Johnson*, 14 M. & W. 408. A license by parol in respect of a patent is clearly determinable by the licensee at his pleasure, as was stated by the law lords in *Crowley v. Dixon*, 10 H. L. C. 308, and I see no good reason why the same rules should not apply to a written license, such as the present, which passes no interest but merely makes that lawful, which without it would be unlawful. So far as form goes a mere license under seal is as much revocable as a license by parol: *McKenzie v. McGlaughlin*, 8 O. R. 111, 115. Herein lies the distinction between the case in hand and the case relied upon by the plaintiffs of *St. Paul Plow Works v. Starling*, 140 U. S. 185, in which the Court proceed upon the footing of the license being in the form and having the effect of a grant and conveyance affecting the patent itself. The difference between such a grant and a license pure and simple is pointed out in the patent case of *Heap v. Hartley*, 43 Ch. D. 461, 468, and is also adverted to in the earlier Canadian case of *Dalgleish v. Conboy*, 26 C. P. 254. If an interest is transferred in the patent, then it requires the consent of both parties to put an end to the transfer; but if the transaction is merely permission on certain terms to invade the monopoly, then the licensee may at his option renounce the license and make the machines patented at his peril. In the present case, by the act of the patentee, one fourth interest in

Judgment.

Boyd, C.

the patent was conveyed to one who assigned it to the defendants, so that they were at one time both licensees and joint owners of the patent. But it was competent for them to put an end to the license and proceed to make the thing invented as part-owner of the letters patent.

It may be that the license as such was determined by the act of the patentee in assigning the patent according to the doctrine of *Coleman v. Foster*, 1 H. & N. 37. If so, the recognition of the license thereafter in the dealings of the parties, would reduce the effect of it to a parol license within *Crowley v. Dixon*. But I think that the parties became at arms length as to royalties by the written notice of determination dated, November 23rd, 1887, and that the plaintiff cannot claim payment thereafter as between licensor and licensee.

Up to that date I understand all matters have been settled between the parties, and this being so, it follows that this action should be dismissed with costs.

A. H. F. L.

[CHANCERY DIVISION.]

ENTNER V. BENNEWEIS.

Seduction—Death of Father—Action by Mother for Seduction in Father's Lifetime—Service.

In an action, after the death of the father, by the mother for the seduction of her daughter in the lifetime of the father, who was an invalid supported by the mother and daughter, no evidence of the actual relationship of mistress and servant was given :—
Held, that the action was not maintainable.

This was an action for seduction brought by Hannah Entner against Ernst Benneweis, which was tried on October 5th, 1893, at Stratford before MACMAHON, J., and a jury.

J. P. Mabee, for plaintiff.

G. G. McPherson, for defendant.

The examination of the plaintiff shewed that the seduction took place while the plaintiff's daughter was residing on the defendant's farm during the temporary absence in the United States of the plaintiff, who, at the time of the commencement of the action was a widow. At the time of the seduction, the father was alive, but was an invalid, and was supported by the wife and daughter. After the seduction, the daughter returned home until the birth of the child in June, 1890, and remained there until after the death of the father in March, 1892. The action was brought by the mother in April, 1893. On this appearing, the Judge withdrew the case from the jury and entered a nonsuit, on the ground that there was no right of action in the mother. Statement.

The plaintiff moved to set aside this nonsuit, and for a new trial, and the motion was argued in the Divisional Court, on December 14th, 1893, before BOYD, C., and MEREDITH, J.

Argument. *Mabee* for the motion. The plaintiff is a widow. Her husband died intestate. The plaintiff sues in her own right as mistress and mother of the seduced daughter. There was a right of action in both the father and mother, as he was an invalid and not a wage-earner or supporter or head of the family. The mother and daughter supported the family. The mother could sue in the father's lifetime, as the rights of married women are much extended by the Married Woman's Property Acts. It has been held in this Court that a wife is entitled to an injunction to prevent her husband coming to her house; in such a case he surely cannot be the head of the house. Here the mother lost the service of the daughter, so the relation of master and servant existed; *Smart v. Hay*, 12 C. P. 528. I also refer to *Smith v. Crooker*, 23 U. C. R. 84; *Kelly v. Bull*, *ib.*, 278; *McIntosh v. Tyhurst*, *ib.*, 565; *Meyer v. Bell*, 13 O. R. 35.

McPherson, *contra*. Although the statement of claim alleges the daughter was servant to the plaintiff, her mother, the evidence shews both the seduction and the birth of the child took place during the father's lifetime. The mother can only claim in two ways, either at common law or by virtue of the statute R. S. O. ch. 58, sec. 1. At common law she had no right because the daughter was in the defendant's service: and under the statute she had no right because the father was alive. The cause of action was complete as soon as the seduction took place; *Evans v. Watt*, 2 O. R. 166. It was held in *Healey v. Crummer*, 11 C. P. 527, that even where the action was commenced by the father in his lifetime, it did not survive to the mother when he died.

Mabee in reply. It is a question of fact here whether the daughter was servant to the mother. The jury should have been allowed to find upon that point.

January 22nd, 1894. BOYD, C.:—

In this case the seduction of the daughter was said to be while she was temporarily at the farm of the defendant,

her mother being absent in Chicago, and her father living at the family home, but comparatively helpless from age or infirmity.

Judgment.
Boyd, C.

The girl was over twenty-one years of age at the date of the alleged seduction, and soon after came home where she continued to live till the birth of a child in June, 1890, and the death of her father in March, 1892. The action is brought in April, 1893, by the mother.

The trial Judge stopped the case on these facts appearing, on the ground that there was no cause of action in the mother. It is now suggested that the case ought to go on in order that it may be proved that the daughter was servant to her mother during the life of the father on account of his helpless condition; and that the mother was really the head and support of the house.

But it appears to me this line of evidence would be beside the purpose unless it could be further proved that the married woman had separate estate in which was the common abode, or that by some transaction apart from the husband, there was a condition of real service between her and her daughter.

The statute does not extend to this case, and the doctrines of the common law action are not to be successfully invoked. The actual or implied relation of master and servant must subsist between the plaintiff and the person seduced at the time of the seduction: *Davies v. Williams*, 10 Q. B. 725.

Here the service of the daughter would be in law attributable to the father and not to the mother. That is, the common law right to service is given to the man who is deemed the head of the family. That relation is not changed because of his personal infirmity or decrepitude, as it is a legal result flowing from the family status. There is no divided right or co-ordinate power of control during the joint-lives; all is in the husband. That being so, the right of action as master vested in him during his life, and it does not pass to his widow as such upon his death.

Judgment.

Boyd, C.

There might have been a transmission to his personal representatives under R. S. O. ch. 110, sec. 9; but the year from his death has now elapsed. This question has been considered in some American cases—which as usual do not agree—but the weight of authority is with the present decision: *Logan v. Murray*, 6 Sergt. & R. 175; *Vossell v. Cole*, 10 Mo. 634; *Gray v. Durland*, 50 Barb. 100 and 211. See *Healey v. Crummer*, 11 C. P. 527, and *Whitehead v. Blaik*, 30 Sc. L. R. 916 (1893).

The nonsuit was, I think, right, and no evidence as suggested during argument, appears sufficient to validate the plaintiff's claim to recover.

MEREDITH, J. :—

It may be that a *de facto* relationship of master and servant would be enough to support this action: see *Harper v. Luffkin*, 7 B. & C. 387: but there was no evidence of any relationship of master and servant, either in law or in fact, given in this case; and it is not contended that in this respect any further evidence could have put the plaintiff's claim upon any higher or better ground.

The other difficulty, that is, the allegation in the statement of claim that the wrong was done whilst the woman was servant of the defendant, might have been got over by an amendment of the pleading, if the facts warranted it; but the absence of any relationship of mistress and servant between the mother and daughter, is fatal to the plaintiff's claim; the action was, therefore, rightly dismissed, and a new trial would not help the plaintiff.

G. A. B.

[CHANCERY DIVISION.]

MISENER

V.

THE MICHIGAN CENTRAL RAILROAD COMPANY.

*Railways—Railway Frog—Railway Company—Packing—Continuous
Duty—51 Vic. ch. 29, sec. 262, sub-sec. 3 (D.).*

The duty of a railway company under sub-sec 3 of sec. 262, 51 Vic. ch. 29 (D.) is not only to fill with packing the spaces behind and in front of every railway frog but continuously to keep the same filled.

THIS was a motion to set aside a verdict in favour of the Statement. plaintiff who, as administratrix of Elgin Misener, her late husband, brought the action on behalf of herself and her children against the defendants for the loss of her husband who was killed by one of the defendants' trains.

The action was tried at Welland, on October 24th, 1893, before ARMOUR, C. J., Q. B., and a jury, who found for the plaintiff.

German, for the plaintiff.

Saunders, for the defendants.

From the evidence it appeared that Elgin Misener was a brakeman in the employ of the defendants, and while in the act of uncoupling cars got his foot caught in an unpacked frog, and was killed. It also appeared that the frog had at one time been packed, but that the packing had been worn down.

The defendants moved against the verdict before the Divisional Court, and the motion was argued on December 11th, 1893, before BOYD, C., and MEREDITH, J.

Saunders, for the motion. There is no evidence of any negligence on the part of the company. The evidence shews that the frog was properly packed at one time, and

Argument. that is all sub-sec. 3 of sec. 262, 51 Vic. ch. 29 (D.) requires to be done. The words used are, "shall be filled with packing." It was filled. When that was once done the company's duty was performed. There was no continuing duty to keep filled with or repair the packing. The Dominion statute is different in this respect from the Ontario statute R. S. O. ch. 212, sec. 5, sub-sec. 1, where the words are, "*at all times* * * shall be filled in with packing," which latter statute does not apply to this case—this being a Dominion railway. The wording of sub-sec. 3, sec. 262, is different from other sections in the same statute even, such as section 190, where signboards "shall be erected and *kept up*"; section 192, where bridges and tunnels "shall at all times be so *maintained*"; section 194, where "fences shall be erected and *maintained*"; section 196, where "fences, etc., * * are duly *maintained*." The words of the statute should plainly express its object: Endlick on the Interpretation of the Statutes, par. 127. It is impossible to keep a frog packed. The evidence shews that the packing in a frog might be destroyed by one passing train. The knowledge of the company, the employer, is necessary. The evidence shews the deceased was guilty of contributory negligence. I refer to *LeMay v. Canadian Pacific R. W. Co.*, 17 A. R. 293; *Rudd v. Bell*, 13 O. R. 17; *Griffiths v. London and St. Katharine Docks Co.*, 13 Q. B. D., at p. 261; *Smith on Negligence*, 2nd ed., 237; *Smith's Master and Servant*, 4th ed., pp. 238, 245.

German, contra. The only possible ground on which the defendants could succeed in shewing no liability is, that under the words of the statute they were not bound to keep the frog packed. If the statute could be so construed, its whole object, viz., protection from dangerous frogs, would be rendered nugatory—once being packed, would be for all time, and when worn out there would be as great danger as if it had never been packed. The statute was not so intended. The onus is on the plaintiff to shew that the frog was packed at the time of the accident. The want of packing shews negligence on the part of the defendants,

and there is no evidence of any contributory negligence on the part of the deceased. I also refer to *LeMay v. Canadian Pacific R. W. Co.*, 18 O. R. 314, and 17 A. R. 293. *Saunders*, in reply.

January 22nd, 1894. BOYD, C.:—

I think the evidence warrants the finding that the proximate cause of the death of Misener was the catching of his foot in the improperly packed "frog," by means of which he was held so as to be run over by the cars of the company moving or backing upon him.

He was where he was, I take it, in the discharge of his duty—directed to go to uncouple cars by the order of his superior, and it is not proved that he exposed himself to the danger by going into a position forbidden by the rules of the company.

The evidence shews that the cars he was to uncouple were not halted that he might be perfectly safe, and if he was trying to uncouple while they were in motion, he may have had one foot inside the track while struggling with the pin and have been in a comparatively safe position had not the inner foot been caught in the frog, so as to deprive him of the ability to move with the car. But there is really no evidence to shew contributory negligence, though theories are suggested on which his representatives might be disentitled to recover on this ground.

The question chiefly argued before us was that the company were in no default because the frog had been packed, and the packing having been worn down or otherwise become out of order, it was not negligent in the company so to leave it.

But the Act cannot be reduced to this impotent result. Section 262 is classed under the head, "*Working of the Railway*," which implies continuity in all that is directed to be done. This particular section (sub-div. 2) means that the space between the converging rails is to be filled in for purposes of safety to the employees, and

Judgment.

Boyd, C.

by parity of reason is to be kept filled in before it is so worn as to again to become a snare and trap for the busy workman. Though it is true there were no direct words expressing maintaining and keeping the frog filled: this is, to my mind, necessarily involved in the whole scope of the provision. The Interpretation Act, if it is necessary to invoke aid, supplies the proper canon of construction by which this remedial enactment is to receive such fair, large and liberal interpretation as will best insure the attainment of the object of the Act according to its true intent, meaning and spirit: R. S. C. ch. 1, sec. 7, No. 56.

The accident happened in May, and at eleven at night. There was no reason why the space should not have been securely and solidly filled: the material used was wood which was not spiked down or solidly fastened, and which is easily worn by flanges of old or well-worn wheels. If a more enduring substance is not used—and the objection given to the use of metal was ice—which was not pertinent to spring and summer months—then more frequent renewals must be made of so perishable a substance as wood appears to be from the evidence before the Court.

I do not think the verdict should be disturbed, and it is affirmed with costs.

MEREDITH, J. :—

The questions of proximate cause, and of contributory negligence, were questions of fact for the jury: and, though the case may not be the clearest and strongest, there is enough evidence to support the findings.

Nor can the legal objection prevail. There is doubtless enough in the lack of plainness and directness in the words used in this enactment, having regard to the words used in other enactments of the same character, to base the argument made in the defendants' behalf, at the trial and before us, upon: but we ought not, unless there be no escape from it, to interpret any statute or contract so as to lead to such absurd conclusions and results; and we are far

from being constrained by the words of the Act to reduce ^{Judgment.} to practically a nullity the remedial enactment in question: ^{Meredith, J} see *Salmon v. Duncombe*, 11 App. Cas. 627; and *LeMay v. Canadian Pacific R. W. Co.*, 17 A. R. 293.

The words "shall be filled," besides being mandatory, may also well enough refer to all future time—be given their full future signification—so as to give effect to the undoubted purpose of this legislation.

And, besides this, it appears from the testimony of the witness Sloggett that the defendants have never complied with the requirement of the Act, that the "packing" shall be well and solidly fastened to the ties on which the rails are laid.

If, as the defendants contend, compliance with the requirements of the Act is practically impossible, relief should be sought from those who make, and not from those who merely administer the laws.

G. A. B.

[CHANCERY DIVISION.]

RE DOMINION PROVIDENT BENEVOLENT AND ENDOWMENT
ASSOCIATION.

Company—Winding-up—Insurance Corporations Act, 1892—Interim Receiver—Insufficient Security—Contempt of Court—Authority of Master.

A Master of the High Court has no authority under the provisions of the Insurance Corporations Act, 1892, to direct security to be given by an officer of a company being wound up, in place of an insufficient security already given by such officer. Section 54, sub-sections 5 and 7 merely provide for the giving of security as interim receiver, which may be made a condition of retention in that office, but default in giving which cannot be punished by imprisonment for contempt.

Statement. THIS was an appeal from the judgment of ROBERTSON, J., on an application to commit one Elijah Kitchen Barnsdale, a former manager of the association, who had failed to comply with an order of a Local Master to furnish a bond.

The association had had its license cancelled by the Registry Officer under 55 Vic. ch. 39 (O.), and Barnsdale, as manager, became interim receiver, giving a bond under the direction and with the approval of the Master for \$1,000, \$500 by himself, and \$250 each by two sureties, for the performance of his duties as interim receiver.

Barnsdale subsequently applied to the Master under section 54 of the Act to be confirmed in his office as receiver : which application was resisted by certain certificate holders and was refused.

The Master, however, made an order (set out in the judgment of the Chancellor), that Barnsdale should execute a bond in the sum of \$5,000, with two sufficient sureties, to take the place of the bond which he had originally given for the due performance of his duties as manager of the association, which latter the Master did not consider a satisfactory or sufficient security for his obligations to the said association.

This bond not having been given by Barnsdale, an application to commit him for contempt in not obeying the Master's order was made, and was argued on November 20th, 1893, before ROBERTSON, J. Statement.

Leighton McCarthy, for the motion.

W. H. Blake, contra.

The learned Judge reserved judgment, and subsequently delivered the following :

November 22, 1893. ROBERTSON, J. :—

The facts I gather from the papers and affidavits filed are : The association in question became an unregistered corporation on or about the 1st August, 1893, by the cancellation of its license or charter, whereupon proceedings were taken to wind up its affairs.

E. K. Barnsdale, the manager, thereupon assumed to act, and did act, as interim receiver, and afterwards applied to the Master at Stratford for confirmation in his said office.

The Master on the 5th October following refused his application, and ordered the said Barnsdale, and one J. A. Robertson, who was also an officer of the association, to execute their bond in the sum of \$5,000 each, with two sufficient sureties in each case, and file the same in his office within ten days from the date of said order ; these bonds to be in substitution of the bonds previously given by them to the association, and then on file in the Master's office.

This order was served on the solicitors for Barnsdale, and on 7th November, 1893, the Master, upon motion therefor, certified that Barnsdale had not complied therewith, and was then in default. Counsel appeared for Barnsdale upon the said motion when the Master so certified, and the order has not been appealed against, varied or set aside, and it is claimed is now in full force. Other facts connected with the affairs of the association appear in the affidavit of Mr.

Judgment. F. W. Gearing, solicitor for certificate holders, filed on this Robertson, J. application, which shew, *inter alia*, that the gross receipts of the association during its existence of little less than four years, amounted to \$45,565.66, and the expenses for the same period amounted to \$13,247.48.

It also appears on the affidavits of Barnsdale that, upon his becoming interim receiver, he transferred all the funds of the said association in the Canadian Bank of Commerce at Stratford amounting to \$794.60, to the credit of this association, subject to the order of the High Court of Justice, and he produces the manager's certificate of such deposit. And he says the only other assets of the corporation at that time were some office furniture of the value of \$15 or \$20, and some \$18,000 at the credit of the said corporation in the hands of the Trusts Corporation of Ontario, and the said Trusts Corporation were notified of the association having become unregistered and directed to pay into Court, or to hold the moneys to the order of the Court; and the said corporation has ever since held said moneys subject to the order of the said Court, and at the credit of said corporation.

Barnsdale also states that between 2nd August, 1893, being the date after which the judgment of the Registrar of Friendly Societies was served upon him, and the date of making his affidavit (15th November, 1893), he had received from the different certificate holders the sum of \$477.08, the last of such moneys being received on 11th October, 1893, the whole of which he has deposited in the Canadian Bank of Commerce, at Stratford, to the credit of the unregistered corporation, subject to the order of the Court, and he produces the several receipts for such payments into the bank, duplicates of which he caused to be filed with the Master.

He also states that he had no notice of the application for the order that he should execute a bond for \$5,000, and the same was made *ex parte* as he is informed and believes.

He also states that he has filed an account of the expenditure of the said corporation from its inception to the

time of its becoming unregistered, and also an account of Judgment.
the moneys received by him, as interim receiver, and pro-Robertson, J.
duces a copy thereof with his affidavit verifying the same.

There is also an affidavit made by Mr. George Gordon McPherson, one of the solicitors for Barnsdale, in which he says that on or about 1st August, 1893, he received from the Master at Stratford a direction, that the interim receiver, E. K. Barnsdale, should furnish and file in his office a bond for the faithful performance of his duties as such, in this matter, under a penalty of \$1,000, the said E. K. Barnsdale in \$500, and two sureties of \$250 each, to be deposited within five days; and on the 12th August, 1893, he complied with such order by filing a bond duly executed by E. K. Barnsdale, and J. G. Gunn and Frederick W. Byatt, as sureties, which bond was approved by the Master on the 12th August, and which had annexed to it affidavits of justification of the sureties.

Upon these facts, motion is made for an order to commit Barnsdale, the interim receiver, and an officer of the said association, to the common jail of the county of Perth, to answer a contempt of Court, in disobeying the order of the Master, made 5th October, 1893, whereby he was ordered to execute his bond in the sum of \$5,000 with two sufficient sureties, and file the same in the office of the said Master, within ten days from date of said order, etc.

The conclusion I have come to after reading and considering with much care, the affidavits, papers and proceedings, produced and filed on the motion, and after considering the statute 55 Vic. ch. 39 (O.), in so far as its provisions relate to a case of this kind is: That assuming all the proceedings preparatory to this motion are regular and in order, there is no provision in the statute which would warrant me in making the order moved for. It is not declared to be a contempt of this Court not to comply with an order for new securities such as was made in this case. The statutory penalty is, that on default of compliance (sub-sec. 7 of sec. 54) the Master may remove the delinquent, and appoint another interim receiver.

Judgment. The parties liable to be declared guilty of a contempt are **Robertson, J.** those mentioned in sub-sec. 6, of sec. 54, and are the persons or person having in their or his charge, custody, possession or power, the securities mentioned in sub-sec. 5, viz., those given by the person who has become interim receiver to the corporation, and in force at the cesser of registry.

There is no complaint that the order for the filing of these documents has been disobeyed; in fact it is shewn that such securities, being the personal bond of Barnsdale to the association upon his being appointed to the office or post of manager-secretary of the association, dated 8th October, 1892, in the penal sum of \$5,000 for the faithful and diligent performance of the duties of his said office or post according to the constitution, laws, rules and regulations prescribed by the said association, etc., etc., and more particularly set out in the said bond, were in due course taken in and filed in the office of the Master, and it being decided by the Master that such securities were not in the opinion of the Master satisfactory or sufficient, he ordered the interim receiver, within a limited time, to give other or additional securities.

I cannot, therefore, find any authority for adjudging this interim receiver guilty of any contempt—it may be wholly out of his power to give this additional security, and if that is the case, it is contrary to the spirit of the law to commit for disobedience of an order which the person named therein is powerless to obey. There can be no contempt in such a case; contempt can only be where it is within the power of the party ordered by the Court to do a thing, which he refuses or neglects to do, or the doing of some act in contempt of an order made, and my reading of the statute makes it plain that, if he does not obey this order for further security, the only penalty attached for non-compliance is to remove him from the office; that is take the winding up of the affairs of the unregistered association out of his hands and place the same in the hands of another: this does not discharge the interim receiver from the liabilities attached to his office

as such, in the way of accounting, etc., but deprives him of the right to wind up the affairs of the defunct association. Judgment. Robertson, J.

I have not overlooked section 58 of the Act, but I do not understand by it that a motion to commit for contempt applies to the non-compliance with an order to furnish further securities, etc.

I must, therefore, refuse the motion, and as in my judgment there is no authority to warrant it, the costs of the respondent must be paid by the applicant.

From this judgment the certificate holders appealed to the Divisional Court, and the appeal was argued on December 14th, 1893, before BOYD, C., and MEREDITH, J.

J. P. Mabee and *L. McCarthy*, for the appeal. Barnsdale was manager of the association, and as such became the interim receiver, and the security he originally gave stands until altered: 55 Vic. ch. 39, sec. 54, sub-sec. 5 (O.). He becomes an officer of the High Court: sec. 53 (1). The Master is the Judge under the Act as to what security should be given, and if the existing security is not satisfactory, other or additional security may be ordered: sec. 54, sub-sec. 7. If removal was the only penalty, there would be no security for past acts if the interim receiver (the former officer of the company) was willing to be removed. The certificate of default of the Master is conclusive. His order for the bond was proper because the evidence shewed the only security for large amounts passing through Barnsdale's hands was his personal bond which was not sufficient: *Petty v. Daniel*, 34 Ch. D. 172; *In re Evans, Evans v. Notion*, [1893] 1 Ch. 252.

G. G. McPherson and *W. H. Blake*, contra. The order was made *ex parte* and does not direct to whom the bond is to be given, or for what purpose. Section 54 points out the duties of an "interim receiver," and indicates the appropriate punishment for neglect of them. Section 57 only applies to an interim receiver. The order

Argument. here is not directed to Barnsdale as an interim receiver, but as an officer of the association, and in this capacity there was no control over him. The whole sense of the statute has reference to receivers or interim receivers actually in office, or at least until finally discharged by passing their accounts. The order is made without jurisdiction, and so is a nullity; *Macfarlane v. Leclair*, 15 Moo. P. C. 181. It should have been personally served; *Holmsted and Langton*, p. 714. There is no suggestion that there has been any impropriety in dealing with the funds of the association, or that for any reason security is necessary to guard it against loss. But even if the facts went so far as to shew a debt due from Barnsdale to the association, what is in effect sought is to compel the giving of security for a past due debt, and for this what authority can be found?

McCarthy, in reply. If the manager is *ipso facto* an interim receiver, when the statute refers to him as an officer, that means as interim receiver.

January 22nd, 1894. BOYD, C.:—

The charter of this association was cancelled by the Registry Officer on 31st July, 1893, whereupon the duties of interim receiver became by the Act devolved upon the treasurer and manager Barnsdale, and he was required by the Master in August, 1893, to furnish a bond for the performance of such duties in a penalty of \$1,000, which was given by himself and two sureties for \$250 each. This bond was approved by the Master on 12th August, 1893.

Afterwards the said Barnsdale made application to be confirmed in his office, and the Master on 5th October, gave judgment refusing the application. He at the same time directed Barnsdale, as an officer of the association, to execute a bond for \$5,000, with sureties by way of substitution as expressed in his order.

The order and direction of the Master is thus framed:

"Upon the application of the solicitor for the policy holders herein,

Judgment.

Boyd, C.

"I do order that J. A. Robertson and E. K. Barnsdale, two of the officers of the above association do execute their bond in the sum of \$5,000 each, with two sufficient sureties in each case, and file the same in my office within ten days from the date of this order, and those bonds shall be considered in substitution of the bonds now in my office."

That order is against Barnsdale, not as receiver but as an officer of the association prior to its dissolution, and is intended to replace the original security given by him when he was appointed to a responsible position in the association, and perhaps is also meant to supersede the bond given by him as interim receiver.

The Master on his application refused to confirm or continue him in the office, so that what is directed to be done appears to be merely to make good a bond theretofore given by Barnsdale when an officer of the going concern.

I cannot read the Act as warranting this direction and penalizing default in compliance by the incarceration of the officer. Section 54, sub-sec. 5, 55 Vic. ch. 39 (O.), contemplates the taking of "new securities" from the interim receiver, by order of the Court, and that is what is referred to in sub-sec. 7, where they are spoken of as "other or additional securities," but still to be given by the interim receiver, and as a condition evidently of his being allowed to continue and act as such: for the failure to give exposes him to being removed from office.

The Act does not provide for the substitution of new securities instead of the old ones in the case of a mere officer of the association, and the direction of the Master to that effect appears to me to be *ultra vires*.

If the officer is also interim receiver, and if he seeks to be continued in the latter office, then, as a condition, the Master may require better security to be given, instead of allowing the old security to be continued in validity as provided by section 54, sub-sec. 5. But that is the only

Judgment.

Boyd, C.

case intended by the phraseology of the Act, and the failure to observe the direction would not seem to be appropriately punished by imprisonment, but by appointing one who will give proper and sufficient security.

Altogether, I think the proceeding unwarranted, and I agree in affirming the judgment of my brother Robertson with costs.

MEREDITH, J. :—

The Master had no power to order the respondent to give security as an officer of the association in respect of his duties as such before becoming interim receiver.

That which the Master could require is security for the due performance of his duties as interim receiver.

Under the 5th sub-sec. of sec. 54 of the Act, until an interim receiver is discharged, or until new security is given by him under order of the Court, the security given by him to the corporation, and in force at the cesser of registry, becomes his security as interim receiver; where there are sureties they are not discharged by reason of the changed circumstances.

Under sub-sec. 7 where no such security exists, or if existing is not in the opinion of the Master satisfactory or sufficient, he may order the interim receiver to give security in the former case, or, in the latter, to give other or additional security; but surely only for the due performance of the duties of the office of interim receiver.

It is usual to take such security from such an officer; very proper that good and sufficient security for the due performance of such duties should be exacted; if security has already been given, which will be sufficient under the changed circumstances, that security is by the Act adopted, if not considered satisfactory or sufficient, other security is to be taken; that is, other security for the due performance of the duties of interim receiver.

The order in question is very indefinite, but it was doubtless intended to compel the giving of security in

respect of the respondent's past duties as an officer of the association, and also, perhaps, for his duties past and future as interim receiver. Judgment.

This was, in my opinion, quite beyond his power.

Apart from any other objection to the motion to commit, it failed for that reason ; and, therefore, this appeal should, in my opinion, be dismissed.

Without referring more fully to any other objection, I may say that where proceedings are to be the foundation of an application to commit for contempt in such a case as this, it would be better, to say the least of it, not to make the order *ex parte*, not to serve it upon a solicitor only where personal service can be effected, and not to make it in uncertain terms : see *Berry v. Donovan*, 21 A. R. 14.

G. A. B.

[CHANCERY DIVISION.]

PIERCE V. CANADA PERMANENT LOAN AND SAVINGS CO.

Mortgage—Building Loan—Further Advances—Priority of Subsequently Registered Mortgage—Registry Act—Notice.

After purchasing certain lands under an agreement which provided that \$2,000 of the purchase money was to be secured by mortgage subsequent to a building loan not exceeding \$12,000, the purchaser executed a building mortgage to a loan company for \$11,500, which was at once registered, but only part of the \$11,500 was then advanced. The plaintiff, who had succeeded to the rights of the vendor under the above agreement, then registered her mortgage for \$2,000, and claimed priority over subsequent advances made by the loan company under their mortgage, but without actual notice of the plaintiff's mortgage, or of the terms of the agreement for the sale of the land:—

Held, that the plaintiff was entitled to priority as claimed.

In such cases each new advance, whether in pursuance of a previous agreement or not, is a new dealing with the land, the acquisition of a new interest therein, and so comes within the provisions of the Registry Act, and, under that Act, the loan company were affected with notice of the registration of the plaintiff's mortgage.

Statement.

THIS was an action for a declaration that the plaintiff's mortgage had priority over the mortgage of the Canada Permanent Loan and Savings Company, as to part of the money secured, and for damages against the defendant Parsons for negligence.

The case was tried on January 23rd, 1894, before FERGUSON, J., at Toronto, in whose judgment and the above headnote the facts appear.

Geo. Bell, for the plaintiff, referred to: *Blackley v. Kenny*, 16 A. R. 522; *Hopkinson v. Rolt*, 9 H. L. C. 514; Registry Act, R. S. O. c. 114, sec. 89; *Richards v. Chamberlain*, 25 Gr. 402; *McVean v. Tiffin*, 13 A. R. 1; *McNamara v. Kirkland*, 18 A. R. 271.

Beverley Jones, for the company, referred to: *Boucher v. Smith*, 9 Gr. 347; *Trust and Loan v. Shaw* 16 Gr. 446; *Beck v. Moffatt*, 17 Gr. 601.

W. H. L. Hunter, for the defendant Parsons.

January 26th, 1894. FERGUSON, J. :—

Judgment.

Ferguson, J.

At the conclusion of the argument I decided that the plaintiff had made out no case against the defendant Parsons: that no default or neglect was proved against him in respect of his conduct as the plaintiff's agent: that the plaintiff should, so far as Parsons had concern, be held bound by the terms of the agreement for sale to Wilson, which provided that for the sum of \$2,000 of the purchase money, she was to take a mortgage on the property sold after, that is, subsequent to the building loan not exceeding \$12,000; and that this is precisely the position in which Parsons her agent had placed her, as a result of what he did for her. I do not see how the plaintiff can recover anything against the defendant Parsons. She endeavoured to make out that she did not understand the contract for sale to Wilson, and that it was not fairly and fully read over to her by her agent. On the evidence given by the plaintiff herself and the witness she called,—her co-vendor, I should have found against her contention in this respect, and when the evidence of the defendant Parsons was given I was of the opinion that there could be no doubt or reason for cavil on the subject.

Wilson, as was contemplated at the time of his purchase from the plaintiff and her then co-owner, made a mortgage upon the property for a sum less than the \$12,000, namely, \$11,500. This was called, and I think it the kind of mortgage known as a "building mortgage." The defendant, the Canada Permanent Loan and Savings Company were the mortgagees. This mortgage was duly registered, and then or very soon thereafter large sums advanced upon it by the mortgagees, a large part of these sums being employed in paying off prior incumbrances on the land. A few days after the registration of this mortgage, and after such large advances made by the mortgagees the mortgage in favour of the plaintiff was registered. There remained, however, a large proportion of the \$11,500 that had not then been advanced to the mortgagor. The

Judgment. defendants the Canada Permanent Society had no knowledge or actual notice of the existence or the registration of the plaintiff's mortgage, and they went on with their contract and advanced to their mortgagor large sums after the registration of the plaintiff's mortgage and before gaining any actual notice of its existence or registration. They advanced all that they did advance, in perfect ignorance in fact of the plaintiff's mortgage. Nor had they any knowledge or notice of, or any concern with, the terms of the agreement of purchase and sale between the plaintiff and her then co-owner and Wilson. They simply saw that the title was clear or made clear of prior encumbrances, had their mortgage registered and proceeded with their transaction as contemplated between them and Wilson, their mortgagor. This mortgage contained a clause to the effect, that neither the execution, nor the registration of it, nor the advance of part of the money should bind the mortgagees to advance any unadvanced portion of it. It also contained a reference to an agreement relating to the buildings in the course of erection on the property, which last, has, I think, no bearing on the contentions here.

The contention of the plaintiff is that her mortgage was not and should not be postponed to the advances made to Wilson their mortgagor by the company after the registration of her mortgage, and if the company when making such advances had had notice, that is actual notice of the plaintiff's mortgage, the authorities shew I think that this contention should succeed: *Hopkinson v. Rolt*, 9 H. L. C. 514; *Union Bank of Scotland v. National Bank of Scotland*, 12 A. C. 53; *Blackley v. Kenny*, 16 A. R. 522. I need not pursue this further, for at the bar this was not disputed.

The case is to be treated, I think, in regard to the matter in dispute, in the same manner as if the plaintiff had lent and advanced to Wilson the sum of \$2,000 at the time of the registration of her mortgage, for as before stated the company had no notice of the terms of the contract by which the sale of the lands to Wilson took place, or that

any part of the purchase money was unpaid by him. For Judgment. the plaintiff it was contended that the company had by Ferguson, J. reason of the registration of her mortgage notice of it, and that any advances made to their mortgagor after such registration are postponed to her mortgage, that is to say, that the company was called upon when making such advances or any of them to search the registry as to any encumbrances or conveyances after their mortgage, otherwise the advances would be made at the peril of being postponed to whatever claims on or in respect of the lands were registered after the registration of the company's mortgage.

In the case *Boucher v. Smith*, 9 Gr. 347, the late V. C. Esten, said that registration is notice of the thing registered for the purpose of giving effect to any equity accruing from it, but it can be notice of any given instrument only to those who are reasonably led by the nature of the transaction in which they are engaged to search and examine the registry with respect to it, that the registration of a mortgage would of course be notice of that mortgage to all persons acquiring any interest in the lands embraced in it.

That case is referred to by the late Chief Justice Spragge (then V. C.) in the case *The Trust and Loan Co. v. Shaw*, 16 Gr. 446, and apparently approved of, the learned Judge adding the view that the registry law as to notice was applicable only to persons acquiring an estate, and this view is referred to and approved of by Vice-Chancellor Mowat in *Beck v. Moffatt*, 17 Gr. at p. 602.

The case *Richards v. Chamberlain*, 25 Gr. 402, was referred to. There the moneys were to be advanced from time to time as the buildings progressed, and the question was in respect to notice of a mechanic's lien which had not, however, been registered. The owner had, for the purpose of the buildings, created encumbrances to the extent of \$20,000, and the mortgages were registered. The learned Judge, at p. 406, after saying that the contractors to receive money had been very supine, says: By the registration of the mortgages they had notice of their existence, and that

Judgment. from the allegations in the pleadings he gleaned that they
Ferguson, J. were not uninformed that the moneys were to be so advanced, and yet they took no steps for their own protection. They might, under the provisions of the Act, have registered a statement of claim before or during the progress of the work. The effect given to such registration is, that the person registering is deemed a purchaser *pro tanto* and within the provisions of the Registry Act. These statements of the learned Judge do not of course decide anything, but they afford, as I think, an inference that his view was that if the contractor had registered his lien—he being then in the position of a purchaser *pro tanto* as a mortgagee is—the registration of the lien would have been notice to the mortgagees when they were making their advances pursuant to the terms of the mortgages. On the same subject the cases *McVean v. Tiffin*, 13 A. R. 1, and *McNamara v. Kirkland*, 18 A. R. 271, may be looked at.

In the case *Hutson v. Valliers*, 19 A. R., at p. 161, Mr. Justice MacLennan seems to deal with the subject now before me. The others of the learned Judges seem to have rested their judgments on other grounds, and I am not certain that what the learned Judge said on the subject was necessary to the decision of the case which was an appeal from the County Court. The meaning of the language is, however, unmistakable. In one place the learned Judge said: "When the plaintiff registered his lien * * he became a mortgagee for the amount of his claim, or, as the lien Act * * declares 'a purchaser *pro tanto*.' The company's mortgage was then registered, but as they had only advanced \$1,350, that sum was the extent of their interest in the lands, and any further sum which they might advance after notice of the plaintiff's lien would be subject to it and would become third in the order of priority." Reference is then made to the cases above mentioned, *Hopkinson v. Rolt*, and *Blackley v. Kenny*, when the learned Judge proceeds by saying: "The only question here is, whether registration of the lien was notice to the company within those decisions, and I see no ground upon

which the contrary can be contended. The ground on which these decisions are rested is, that each new advance whether in pursuance of a previous agreement or not, is a new dealing with the land, the acquisition of a new interest therein, and if so, it comes within the express provisions of the Registry Act.”

Judgment.
Ferguson, J.

This view I am willing to say was at first somewhat startling to me, but after considering the subject I think my proper course is to adopt it, and, it being adopted, it seems plain that the plaintiff's mortgage should be declared to have priority over the advances made by the company after the registration of it, as such registration must in this view be considered notice of it to the company at the time of their acquiring further interests in the property by making the further advances on their mortgage.

As the company have sold the land mortgage, and as I understand, have realized from the sale an amount far exceeding the amount which they had advanced upon their mortgage before the registration of the plaintiff's mortgage, no special directions would seem to be necessary further than if need be the accounts be taken, and an order upon the company to pay the plaintiff to the extent of her mortgage and interest out of the moneys so received by them over and above the amount they had advanced before the registration of the plaintiff's mortgage, interest thereon, costs, charges, etc., so far as the same may extend.

The action as against the defendant Parsons will be dismissed, and I think with costs, and the plaintiff will have her costs of the action as against the company.

I think it proper to add that the subject is an important one as it appears to me, that although the foregoing is the best I can do with it in the present state of the authorities, I cannot say that I am entirely satisfied so far as the case of the company has concern, and I think it proper that all proceedings on this judgment should be stayed for a period sufficient to afford an opportunity to the company to obtain, if they see fit, the opinion of an appellate Court.

[COMMON PLEAS DIVISION.]

REGINA V. CHARLES.

Intoxicating Liquors—Liquor License Act—Driving Park—Club—Selling Liquor without License—Locality of.

A company was incorporated under the Joint Stock Letters Patent Act, R. S. O. ch. 157, for establishing a driving park to improve the breed of horses, etc., and for such purposes to acquire a certain named property, with power to erect a club house, and, subject to the Liquor License Act, to maintain and rent or lease same, for social purposes, etc.; and generally to do all things incidental or conducive to the objects aforesaid :—

Held, that the charter did not authorize the company to have a club house at any other place than that specified in the charter; and where, therefore, the defendant was found in possession of and selling liquor at another place, though claimed to be a club constituted under the charter, and of which the defendant claimed to be the secretary, he was properly convicted under section 50 of the Liquor License Act, R. S. O. ch. 194, for unlawfully keeping liquor for sale, barter, or traffic, without a license.

Statement. THIS was a motion to quash a conviction of the defendant by the police magistrate of Toronto for unlawfully keeping liquor for the purpose of sale, barter, or traffic without a license.

In Michaelmas Sittings, November 22nd, 1893, before GALT, C. J., ROSE and MACMAHON JJ., *A. G. McLean* supported the motion. The defendant was the secretary of "The Dufferin Park Company of Toronto [limited]," incorporated under the Joint Stock Letters Patent Act, R. S. O. ch. 157, for the purpose of establishing a driving park, etc. The club had the right to sell liquor. Sec. 53 of "The Liquor License Act," R. S. O. ch. 194, does not apply, as the clubs referred to therein are clubs incorporated under the Benevolent Societies' Act, R. S. O. ch. 172, and not to those under the Joint Stock Act: *Regina v. Austin*, 17 O. R. 743. It may be contended that sec. 50 applies, by construing the word "person" used there to mean "corporation" by virtue of the Interpretation Act, but the word "person" in the Act means individual, and could not be applied to a corporation. Where it is desired to

deal with a corporation it is done so expressly as in sec. Argument.
53: *Pharmaceutical Society v. London and Provincial Supply Association (Limited)*, 5 A. C. 857. That case is also an authority for the proposition that the defendant, the secretary merely of the corporation, would not be liable. This point was expressly decided in *Regina v. Hodgins*, not reported. (a) In any event there was not a keeping of liquor for sale within the meaning of "The Liquor License Act." There was merely a supplying of liquor to the proprietors or members who are all interested

(a) REGINA V. HODGINS.

THIS was a motion to quash a conviction for selling liquor without a license.

The facts were: At a dinner given at the Ottawa Club, a purely social club, one of the guests who was not a member ordered some wine, giving the waiter his cheque in payment. The waiter delivered it to the steward, who on the following morning handed it to the defendant, the secretary of the club, which was the first he knew of the sale; and, so far as appeared, he was not aware that the guest was not a member. On the receipt of the cheque by the secretary, in consequence of some informality, it was returned to the drawer and a new cheque procured.

On November 23rd, 1892, before GALT, C.J., and ROSE, J.

Aylesworth, Q.C., supported the motion.

Langton, Q.C., contra.

November 23, 1892. ROSE, J.:—

The sale in this case was complete when the cheque was accepted by the waiter. The procuring by the defendant as secretary of the club of a cheque formally drawn in the place of one affected by some informality cannot, in any view of the case, make the secretary the vendor—when, as here on the evidence, he did not know of the sale until after it was made. And there is no evidence to shew that in any wise was he aware that wine was to be sold to any one not a member of the club. The club was the proprietor and owner of the wines and the steward its agent, and in no sense the agent of the defendant. The defendant could not be convicted for the act of any other servant of the club to which he was neither party nor privy.

There was no doubt an illegal sale by a servant of the club, which was rendered possible by careless management, for which very probably the defendant, jointly with others, was to blame. So, while the conviction must be quashed, it will be without costs, and the usual order for protection will go.

GALT, C.J., concurred.

Argument. in the property of the corporation. In the case of *Graff v. Evans*, 8 Q. B. D. 373, it was held that where intoxicating liquors were supplied to a member of a club by the manager this was not a sale or exposing for sale within the Imperial Licensing Act of 1872, 35 & 36 Vic. ch. 94. See also *Newell v. Hemingway*, 58 L. J. N. S. 46-48; *Bouyer v. Percy Supper Club*, [1893] 2 Q. B. 154; *Templeman v. Trafford*, 8 Q. B. D. 397.

Cartwright, Q. C., and *C. R. W. Biggar*, Q. C., contra. The company here does not come within the meaning of the cases referred to by the other side. The charter defines the objects of the company, namely, to establish a driving park, to improve the breed of horses, and to give prizes for exhibitions of speed, etc., and to erect a club house on certain lands defined, and to maintain same, but subject to "The Liquor License Act." Persons were authorized to become members, and to use the premises for the specific purposes named. This was not a social club, to which the cases refer, but at most was merely a proprietary club. It was, however, not a club at all, for as a matter of fact the defendant Charles was himself the club, two or three parties being taken in so as to give colour to the scheme, which was a clear evasion of the Act. The defendant was properly convicted under sec. 50 as the actual offender; but, even if the club should be deemed to be the offender, then it would be liable under sec. 50, the word "person" under the Interpretation Act including corporation. The case of *Regina v. Hodgins* is quite distinguishable. In that case the defendant was the secretary of a purely social club. In no event could the defendant protect himself behind the charter for the place where the offence was committed was not on the driving park premises, but at the Occident Hall, in the city of Toronto, to which the charter in no way applied.

A. G. McLean, in reply. The charter gives the corporation power to lease premises any where, and, therefore, the Occident Hall comes within its terms. The charter expressly gives power to form a social club.

January 6, 1894. MACMAHON, J.:—

Judgment.

MacMahon,
J.

The defendant is one of the corporators under the Joint Stock Companies Letters Patent Act, R. S. O. ch. 157, the purposes of the corporation being, as defined in the Letters Patent issued on the first day of June, 1892: "To establish a driving park to improve the breed of horses, and to give prizes for exhibitions of speed, and for the said purposes to acquire the lease of the Dufferin Park property on the west side of Dufferin street, in the city of Toronto, 161½ acres of land on which are erected houses, a grand stand, stables, * * and to erect on the said lands a club house, and, subject to the Liquor License Act, to maintain and rent or lease the same, if desirable, for social purposes. * * To charge such fees as the company may deem expedient to all or any persons having or using any of the privileges of the said company, or its property; and generally to do all such things as are incidental or conducive to the attainment of the objects aforesaid, or any of them under the name of "The Dufferin Park Company of Toronto [Limited]."

The stock taken by the applicants amounts to \$5,800, and of this sum John Sebastian Charles (the defendant), owns \$5,000, William Jones, \$500, and Thomas Smith, Joseph William Lawey, and James Edward Clark, \$100 each.

At what is known as the Occident Hall on Bathurst street, in Toronto, the police, on the 11th of March last, found a barrel nearly full of ale, also some bottled porter, some whiskey, and wine, etc. There were a number of men drinking in the place. The defendant Charles stated he was the secretary of the Club owning the place, and that a man named Ross acted as steward under his instructions.

The conviction is under the 50th section of the Liquor License Act for keeping spirituous or fermented liquors for sale, barter, or traffic therein, etc., without a license.

Judgment. The rules of the Dufferin Park Company's Club were put in. The first rule provides that every candidate for membership shall put in a written application to the secretary. And by rule 9 any member may introduce a friend residing not less than five miles from Toronto, to all privileges of the Club for two weeks, and the member shall notify the secretary thereof.

MacMahon,
J.

"The Dufferin Park Company" has, under its charter, no authority to have a Club in any other place than that mentioned in the charter, viz.: on the "Dufferin Park grounds," and then the Club can only be organized and used by its members subject to the Liquor License Act. Otherwise it was simply a Joint Stock Company for the particular purposes mentioned in the charter. And as the Dufferin Park Company can have no "Club" except at the place named, and subject to the Act, then, although the Club may nominally be the occupants of the building, was Charles the person in possession of the liquors there for the purpose of sale, barter, etc., so as to be the person "actually contravening any of the provisions of this Act," and so coming under sub-sec. 2 of sec. 112 of "The Liquor License Act"? The defendant was called as a witness on his own behalf and said liquor was sold at the Occident Hall to members; and Ross said the same thing. If, as admitted, Ross is there under Charles, as secretary, and the latter receives from the steward the money, then Charles is the person in possession of the liquors there for sale, etc., and having no license he cannot set up the Letters Patent as justifying the establishment of such a Club.

Regina v. Hodgins is not an authority for the defendant in this case. In that case Hodgins was the secretary of a proprietary Club which can supply liquors only to its members. The steward, without the knowledge of the secretary, supplied wines to a non-member, for which the secretary received pay without knowing that the money came from a non-member. It was properly held the secretary (Hodgins) was not guilty of an offence against the License Act. Here there was no Club and could be

no Club under the Letters Patent unless it possessed a license. Judgment.

MacMahon,
J.

The defendant was violating the law when intoxicating liquors were in his possession where they were found with the intention of selling, etc.: See *Bowyer v. Percy Supper Club*, [1893] 2 Q. B. 154.

The motion must be dismissed with costs.

GALT, C. J., and ROSE, J., concurred.

[COMMON PLEAS DIVISION.]

REGINA V. WHITAKER.

Municipal Corporations — By-Law—Merry-go-Round — Con. Mun. Act (1892), sec. 489, sub-sec. 25—Certiorari—Six Days' Notice of Application for—Waiver.

A city by-law, passed under sub-section 25 of section 489 of the Con. Mun. Act (1892), § 5 Vic. ch. 42 (O.), prohibited exhibitions of wax works, menageries, circus riding, and other such like shows, usually exhibited by show-men:—

Held, that this would not support a conviction for exhibiting a machine called a merry-go-round, as constituting no offence under the by-law or statute.

A preliminary objection, that the magistrate had not six full days' notice of the application for the writ of *certiorari* taken on the return of the motion to make absolute the order *nisi* to quash the conviction, was overruled, on the ground that the magistrate, on the facts appearing in the case, had waived the right to take the objection.

THIS was a conviction for exhibiting a machine called Statement.
a merry-go-round contrary to a certain by-law of the city of St. Thomas, prohibiting exhibitions of wax-work, menageries, circus-riding, and other such like shows usually exhibited by showmen.

The evidence shewed that no charge was made for merely looking at the merry-go-round; but a charge of five cents was made for riding on it.

Argument. In Hilary Sittings, February 9th, 1894, before GALT, C. J., and ROSE, J., on *Tremear* and *N. McDonald* proceeding to support the order *nisi*, *Glenn*, for the magistrate and private prosecutor, took the preliminary objection that the magistrate had not had six days' notice of the application for the writ of *certiorari*, and that, therefore, the *certiorari* was invalid, as well as all subsequent proceedings thereon, relying on *Regina v. McAllan*, 45 U. C. R. 402.

Tremear and *McDonald*, in answer, urged that the magistrate had waived his right to take the objection, relying on the reasons set out in the judgment below as distinguishing *Regina v. McAllan*, 45 U. C. R. 402.

The Court, subject to the preliminary objection, held that the conviction could not be supported, as the evidence shewed no offence against the by-law, or the statute, subsection 25 of sec. 489 of the Consolidated Municipal Act of 1892, 55 Vic. ch. 42, (O).

February 12, 1884. ROSE, J. :—

As to the preliminary objection, that the magistrate had not full six days' notice of the application for the writ of *certiorari*, *Regina v. McAllan*, 45 U. C. R. 402, is no doubt authority that it may be raised on the return of the motion to make absolute the order *nisi* to quash the conviction, unless the magistrate has waived the right to take the objection; and it seems to me clear that here there has been such waiver.

The magistrate was asked at the hearing to postpone the date for payment of the fine so as to enable an application to be made. He assented to this, but fixed a date within six days, so that if full notice had been given, the fine would have become payable before the return of the motion. He received notice, and after service of the writ upon him, had a conversation with the defendant's solicitor and did not raise any objection to the proceedings.

He also made a return to the writ, and at the next sit-

tings of the Divisional Court, an order *nisi* was obtained to quash the conviction. The case was set down on the paper, and counsel for the prosecutor and magistrate, attended to shew cause, but owing to the case not being reached it stood over until this Court.

On service of the order *nisi* to quash the conviction, a copy of the affidavit on which the writ had issued, was demanded and served.

No objection was raised to the regularity of the proceedings until the motion came on for argument, where no doubt, as the only refuge from the storm, shelter was taken behind it.

On reason and authority, I think the objection comes too late. If the magistrate had intended raising the objection, he had full opportunity to do so upon being served with the notice, but when he not only did not then object, but in a manner assisted the defendant to proceed—as appears from the affidavit of service of the notice and the affidavit of Mr. McDonald—and only objected after the order *nisi* to quash the conviction was not only obtained but set down for argument and adjourned until a subsequent sittings; no motion having been made to quash the writ and no notice given of an intention to take the objection, I think we need not hear the objection.

It should, I think, have been so held, apart from authority, for *Regina v. McAllan* is not to the contrary. The facts differ. There the Justices had no notice of the motion that was made—the notice given not having been acted upon; no return was made by them, but by the Clerk of the Peace, and the first act they did was to appear on the return of the motion to make absolute the rule *nisi*.

I do not say at what moment, or on what facts, a waiver is established, or generally when it becomes too late to take such an objection; but I am of the opinion that in this case, on the facts appearing before us, the objection comes too late.

But there is authority to support the defendant's posi-

Judgment.

Rose, J.

Judgment. tion, viz., *The Queen v. Inhabitants of Basingstoke*, 19
Rose. J. L. J. Mag. Cas. 28. The decision there given was by Erle,
J., after consultation with the other Judges.

The language of the learned Judge in delivering his opinion, is in part very applicable to this case. After stating other grounds, he continues, at p. 29 "And also, because the objection when taken by one of the litigant parties is wholly beside the merits, the notice having been required for the sake of the magistrate, and it being improbable that the magistrates who granted a case in sessions, should out of sessions desire to prevent it from being heard. It is not necessary to define within what time the objection may be taken; but when a whole term has elapsed without objection being made after the case has been brought up, the preliminary facts must be taken to be admitted, and the application is then too late."

It will be observed that in that case the objection to the notice was raised on a motion to quash the writ which makes the case a stronger authority here for the defendants.

On the main motion we decided on the argument that the conviction was bad, the evidence shewing no offence against the by-law or statute, there being no "exhibition" at all shewn within the meaning of sub-section 25 of sec. 489 of the Consolidated Municipal Act, 55 Vic. ch. 42.

The informant is pressing this case with an interest in the penalty, and, notwithstanding the fact that the defendant's counsel announced his intention to bring the case before the Court for its opinion upon the statute and by-law, the informant, on the same day that judgment was given, laid a second information on which the defendant was again fined the full penalty of \$50, the ground being persistence in violation of the by-law.

The conviction should be quashed with costs against the informant, but with the usual order of protection.

GALT, C.J., concurred.

G. F. H.

[CHANCERY DIVISION.]

MULCAHY V. COLLINS ET AL.

Husband and Wife—Married Woman—Separate Estate—Contract respecting.

A married woman having been informed by a relative that he had made his will in her favour, signed a promissory note three days after his death, before she had seen the will and some weeks before it was proved. The will gave her a vested interest in the property bequeathed :—
Held, that she was possessed of separate estate, and had contracted with respect to it.

THIS was an action brought by Thomas Mulcahy against Michael Collins and Elizabeth Collins, husband and wife, on a promissory note. Statement.

The principal defence set up by the wife was that at the time of her signing the note she had no separate estate, and did not contract with reference to any.

The facts appear in the judgment.

The action was tried at the Toronto Assizes, on January 26th, 1894, before STREET, J., without a jury.

Wm. Macdonald, for the plaintiff. The defendant Elizabeth Collins had an interest under the will of her uncle, and she was aware that such was the case. She signed the note with that knowledge, and must be held to have contracted with respect to her separate estate, whatever it was. Every contract entered into by her must be so deemed : R. S. O. ch. 132, sec. 3, sub-sec. 3. The evidence shews she was married in 1864, so she has the right to dispose of her property whether in possession or not, under section 7. She was entitled to a chose in action, and that is a species of property; *Colonial Bank v. Whinney*, 30 Ch. D. at p. 285.

W. H. Blake, for the defendant. The wife had no actual knowledge of taking any interest under the will of the uncle. It is true he may have told her about it, but it did

Argument. not follow that it was so. She really had no separate estate, and did not contract with reference to it. Any estate she might have was vested in the executor by virtue of the Devolution of Estates Act. I refer to *Leake v. Driffield*, 24 Q. B. D. 98; *Sweetland v. Neville*, 21 O. R. 412; *Moore v. Jackson*, 22 S. C. R. 210; *Martin v. Magee*, 18 A. R. at p. 390, R. S. O. ch. 108, and 54 Vic. ch. 18 (O.).

Macdonald, in reply. The law as to where personal estate is vested, is not changed by the Devolution of Estates Act.

February 5th, 1894. STREET, J.:—

This was an action tried before me at the Toronto Winter Assizes, on 26th January, 1894, without a jury. The plaintiff claimed \$900 and interest upon a joint and several promissory note for that amount, dated 4th September, 1891, made by the defendants, Michael Collins and Elizabeth Collins, his wife.

The only question raised was as to whether the defendant, Elizabeth Collins was possessed of separate estate at the time she made the note in question.

As to this, the circumstances were these: Patrick Collins, the uncle of her husband, died on 30th August, 1891, and by his will devised to her the rent of his real estate, and made her a residuary bequest of his farm stock. Before his death he had told her that he had made his will in her favour. On the day of the funeral she signed the note in question: at that time she had not seen the will, and the will was not proved for some six weeks afterwards.

She had, however, under the will a vested interest in the property bequeathed to her; and she had a sufficient knowledge of the existence of her interest to enable me to hold that she should be taken to have contracted with respect to it; *Moore v. Jackson*, 22 S. C. R. 210; R. S. O. ch. 132, sec. 3, sub-sec. 2.

It is unnecessary to consider whether the possession and ownership of the note which Elizabeth Collins held against

her husband, but which was of little present value, was sufficient to enable her to contract.

Judgment.

Street, J.

There should be judgment for the amount of the note and interest less \$40 paid on account, together with full costs of the action.

G. A. B.

[QUEEN'S BENCH DIVISION.]

RE CHRISTIE AND TOWN OF TORONTO JUNCTION.

Arbitration and Award—Interest of Arbitrator—Employment as Counsel—Bias—Disqualification.

Upon a motion to set aside an award of two out of three arbitrators, it was objected that one of the two, a Queen's counsel, was disqualified by reason of interest. It appeared that, for some years prior to the arbitration, he had from time to time acted as chamber counsel for the standing solicitor of a corporation, one of the parties to the arbitration, and had advised him with respect to matters affecting the corporation. It did not appear that he was the standing counsel for the corporation, nor for the solicitor in matters affecting the corporation, nor that he had advised or acted for the corporation or for the solicitor after his appointment as arbitrator, nor that there was any business connection between him and the corporation :—

Held, that there was no such relation between him and the corporation as might give rise to bias or shew an interest which would invalidate the award.

Vineberg v. Guardian Fire and Life Assurance Co., 19 A. R. 293, distinguished.

THIS was a motion by the claimant to set aside an award made by two out of three arbitrators appointed to ascertain the compensation to be paid to the claimant by the town corporation for injury to certain houses of his by reason of the grade of the streets to the front and side of them being raised by the corporation.

Statement.

Mr. Armour, Q. C., and Mr. Osler, two of the arbitrators, joined in an award of \$200. The remaining arbitrator, Mr. Morgan, junior Judge of the County Court of York, was in favour of awarding a larger amount.

One of the objections raised was that Mr. Armour was disqualified by reason of interest from acting as arbitrator. This objection is dealt with in the portion printed below of the judgment upon the motion.

Judgment.

Rose, J.

Argument was heard on the 19th December, 1893.

Wallace Neshitt and *A. Cecil Gibson*, for the claimant.
Going, for the corporation.

January 29, 1894. ROSE, J. :—

The first ground argued on behalf of the claimant was that the award was invalid by reason of one of the arbitrators, Mr. Armour, appointed on behalf of the corporation, having acted as counsel for Mr. Going, the corporation's solicitor, and, while so acting for him from time to time, having on more than one occasion advised him with respect to matters affecting this corporation.

Mr. Armour was appointed arbitrator by order of the Judge of the County Court of York, on an application by the claimant, the corporation neglecting or refusing to appoint an arbitrator, after notice served by the claimant. But upon such application counsel for the corporation asked the learned Judge, if he was of opinion that an arbitrator should be appointed, to appoint Mr. Armour, and an order was made accordingly.

There was no evidence to shew that Mr. Armour had acted either for Mr. Going or for the corporation during the progress of the arbitration or after his appointment. I think the contrary appears.

Exactly what were the business relations of Mr. Armour and Mr. Going, or the corporation, does not satisfactorily appear. Both Mr. Armour and his partner, Mr. Williams, were examined for the purpose of this motion. Mr. Going appeared acting as counsel for the corporation on such motion, and at his instance, and sometimes, apparently, without his objection, information was refused as to what work had been performed and the time when it had been performed by Mr. Armour for Mr. Going, or for the corporation. No motion was made to compel these gentlemen to give the evidence required, the counsel for the claimant apparently being satisfied with the refusal to answer for the purpose of his motion.

Two cases were cited in support of the motion, viz.,

Connée v. Canadian Pacific R. W. Co., 16 O. R. 639, and *Vineberg v. Guardian Fire and Life Assurance Co.*, 19 A. R. 293. Both of these cases were before myself.

Judgment.

Rose, J.

The *Vineberg* case probably goes the farthest of any case that can be cited, and it is a little difficult to distinguish in principle that case from the one before me; and yet I think that it ought to be distinguished to this extent, that it not appearing that Mr. Armour was the standing counsel for the corporation, nor that he was the standing counsel for Mr. Going in respect to matters affecting the corporation, nor that he had acted for the corporation pending the arbitration, and it appearing that he had from time to time during some years prior to the arbitration acted as what may be called chamber counsel for Mr. Going, and that the matters respecting the municipality were merely incidental to such business relations, and that thus there was no business connection between Mr. Armour and the corporation, I should not hold that there was such relation between the arbitrator and the corporation as might give rise to bias or should fairly lay the arbitrator open to observation.

I confess I arrive at this conclusion with some hesitation and doubt, in view of the *Vineberg* case, and probably am influenced by my knowledge of what has been customary in the profession in the appointment of professional gentlemen of high standing as arbitrators. I have never heard it suggested that it was necessary to inquire whether the solicitor who named a professional gentleman as arbitrator had or had not business relations with such gentleman as counsel or otherwise.

I think I must leave it to the appellate tribunal—if it is thought desirable to further consider this question—to lay down the law in accordance with the claimant's contention, if it is to be so decided.

[The remainder of the judgment dealing with matters which are not of importance except to the parties is not reported.]

E. B. B.

[COMMON PLEAS DIVISION.]

SCARTH ET AL. V. THE ONTARIO POWER AND FLAT
COMPANY.

Landlord and Tenant—Fixtures—Machinery—Removal of—Provisions of Lease—Chattels—Forfeiture of Term—Action to Recover Possession of Goods—Evidence of Detention.

Where a trade fixture is attached to the freehold, it becomes part thereof, subject to the right of the tenant to remove it if he does so in proper time; in the meantime it remains part of the freehold.

Meux v. Jacobs, L. R. 7 H. L. at pp. 490, 491, followed.

But where the parties have made a special contract, they have defined and made a law for themselves on the subject.

Davvy v. Lewis, 18 U. C. R. at p. 30, followed.

In a lease dated in July, 1890, there was a provision that the lessees might, during the term erect machinery upon the demised premises, which should be the property of the lessees and removable by them, but not so as to injure the building, etc. The lessees affixed machinery to the building demised, and afterwards, in April, 1892, made an assignment for the benefit of creditors. The lessors elected to forfeit under a clause in the lease, but they permitted M. G., a purchaser of the machinery from the lessees' assignee, to remain in possession, paying rent, until December, 1892, when she ceased, leaving the machinery on the premises. The defendants became the purchasers of the freehold by virtue of a sale under the power in a mortgage in July, 1892, but the lease had come to an end before their title commenced. The plaintiffs claimed the machinery under a chattel mortgage made by M. G. on the 25th April, 1892, and a subsequent assignment from her of the whole of her interest therein, and in March, 1893, they brought this action to obtain possession:—

Held, that the machinery was, owing to the provisions in the lease, chattels, and the property of the lessees, and continued to be so until they made the assignment, when it passed as chattels to their assignee, who transferred it as chattels to M. G., and she to the plaintiffs; that the forfeiture of the term did not affect the right to the property nor the right to remove it; that nothing had taken place to defeat that right, and the plaintiffs were in good time to exercise it.

The defendants, being in possession of the machinery, and being asked for it by the plaintiffs, asserted title in themselves, and warned the plaintiffs that if proceedings were taken they would set up such title:—

Held, that a wrongful detention of the goods was shewn, and that the action of replevin therefore lay.

Statement. THIS was an action tried before FERGUSON, J., without a jury, at Toronto, on the 17th, 18th, 20th, and 24th of November, 1893. The facts are stated in the judgment. The action was begun on the 30th March, 1893.

Moss, Q. C., and *A. W. Anglin*, for the plaintiffs.

McCarthy, Q. C., and *H. S. Osler*, for the defendants.

January 8, 1894. FERGUSON, J.:—

Judgment.

Ferguson, J.

This is an action in which the plaintiffs obtained an order of replevin and afterwards an order amending the same. The plaintiffs pray for replevin of all the goods and chattels mentioned in the amended order, the delivery to them of such of the goods and chattels as still remain upon the premises of the defendants, large damages and costs.

The pleadings are not at all such as were in use in actions of replevin under the former practice. By the statement of claim the plaintiffs profess to set forth their title to the property in question, and the defendants in like manner by their statement of defence profess to set forth their title to the same property, or, at least, the reasons why, the property being in their possession, the plaintiffs are not entitled to have it or the possession of it.

In the month of July, 1890, a former company, named "The Toronto Flats and Power Company," then being the owners, subject to a mortgage to the Canada Permanent Loan Company, of the real estate on which the property in question here was at the commencement of this action, and on which a large part of it still is, granted a lease of a flat, and some other parts of the property, to Gall and Anderson, trading under the name Gall, Anderson & Co., for the purposes of their business, which appears to have been that of a planing mill or factory and a lumber business, for the period or term of five years, to be computed from the date of the lease. The rent was the sum of \$1,500 a year, which, to put the matter shortly, was to be paid *in kind* by Gall, Anderson & Co. furnishing steam for power and heating purposes to other tenants of other portions of the same property, the whole, as it appears, being a very large affair and there being many tenants. It appears to have been considered necessary that Gall, Anderson & Co. should have for the purposes of their intended business on the premises, much, and expensive, machinery, etc., etc., there being however, as it appears, in the part of the pro-

Judgment.
Ferguson, J. perty leased to them some such machinery, etc., belonging to the lessors, which it was intended should be used by the lessees; and by the lease it was agreed and provided that the lessees might at all times during the currency of the lease, and any renewal thereof, erect, set up, and use in and upon the part demised to them such additional machinery, pipes and shafting as might be necessary or convenient for effectually carrying on their business, and that the same should be the property of the lessees, and should be removable by the lessees so as the lessees making such removal did not injure the buildings, or otherwise did put the same in like plight and condition as the same were in before the erection of anything so removed.

The lessees, Gall, Anderson & Co., went in under the lease and placed in the premises leased to them a very large quantity of machinery, etc., most, or a large part of which (being all, as I understand, or mostly all that is now really the subject of dispute, although some other property is embraced in the action), was and still is fastened or affixed in some way in or to the building and property leased to them, that is to say, the portion of the property embraced in their lease.

The business was carried on by the lessees, and the rent paid in the manner provided for by the lease until the 5th day of April, 1892, when the lessees made an assignment for the benefit of creditors, and the lessors, taking advantage of the usual clause which was contained in the lease, elected to forfeit. The assignee, however, made an arrangement with the lessors whereby he had possession and continued the business for a period of about three weeks, when, for the consideration of the sum of \$20,183.55, he sold the property of the lessees to Mrs. Maria Gall.

The bill of sale to her bears date the 25th day of April, 1892, and by a perusal of the schedule of property attached to and forming part of it one sees that all, or nearly all the property so purchased by her is machinery, etc., belonging to the business of Gall, Anderson & Co., and situated upon the premises as aforesaid.

After her purchase from the assignee, Maria Gall entered Judgment. into possession of the demised premises and carried on the Ferguson, J. business that had been carried on by Gall, Anderson & Co. there, paying and satisfying the rent in the same way as they had done without any objection on the part of the lessors till the 10th day of December, 1892, when she ceased. In the pleadings it is said that she maintained and observed the provisions of the lease, but I apprehend that this expression is not strictly accurate.

The prior mortgage upon the property before mentioned in favour of the Canada Permanent Loan Society, was made by former owners, Kanady and others, to secure a large sum. It was made on the 21st day of December, 1888. Default having taken place the mortgagees offered the property embraced in their mortgage, which comprehended that leased to Gall, Anderson & Co., for sale under their power of sale, and William Miller, who had been President and Director of The Toronto Flats and Power Company, and who afterwards became, and as I understand now is, President of the defendant company, became the purchaser for a large sum. The conveyance made to him pursuant to his purchase bears date the 14th day of July, 1892, and afterwards, on the 28th day of January, 1893, he, Miller, sold and conveyed to the defendants. In the mortgage of the 21st December, 1888, from Kanady and others to the Canada Permanent, reference is made to machinery, etc., on the premises, and it is stated that the mortgage was intended to comprise, in addition to every thing that usually passes under the term land or lands, all the machinery now upon or hereafter to be placed upon the premises necessary to the manufacturing carried on, or to be carried on upon the premises, all of which machinery is to be considered as fixtures for the purposes of the mortgage (*except machinery and trade fixtures belonging to the tenants having a right to remove the same*). The conveyance made to Miller, pursuant to his purchase under the power of sale in this mortgage, is simply a conveyance of the land by description. It is silent as to any machinery, etc.

Judgment.
Ferguson, J. One would say that machinery, etc., belonging to tenants having the right to remove the same could not pass by the mortgage to the Canada Permanent, nor from them to Miller, nor from Miller to the defendants.

I need not, I think, pursue this matter further here, as counsel for the defendants, though he did not formally make the concession so as to bind his clients, said he did not contend that the defendants had any higher or better claim than had the lessors in the lease. This view was offered, counsel admitting, most modestly, the possibility of his being in error. I happen to think that he was quite right.

On the 25th of April, 1892, Maria Gall executed a chattel mortgage upon all the machinery, etc., to the plaintiff Scarth to secure an endorsation of a promissory note by him for the sum of \$35,000, which, as is said, was to enable her, Maria Gall, to carry out her purchase from the assignee. As it seems this note was discounted by the plaintiff, the Quebec Bank, and the said Maria Gall afterwards assigned all her interest in the property in question to the Quebec Bank. This last assignment I have not before me, but the matter was, as I recollect, an undisputed fact at the trial, so that the two plaintiffs have between them the legal and equitable interests in the property in question, if it is assumed that their title thereto is good as against the defendants. It was contended that the defendants never actually got the interest of the lessors to Gall and Anderson, because before their title commenced the lease had come to an end, by which I suppose was meant that the defendants never stood in the position of lessors having the reversion; and I think this is really so.

At the trial as it appeared that the property in dispute consisted of a very large number of items embraced in a large number of classes, many of the classes probably or possibly not being in precisely the same legal position, and that a trial of the whole of the matters in detail would occupy an unreasonably long period, possibly involving what would be, or be much like taking accounts, it was

agreed that the trial should proceed in respect of two Judgment.
questions only and matters arising out of them, leaving Ferguson, J.
what it was said might be called "details" to be subsequently considered, and a course selected and adopted for disposing of them.

The first of these two questions was as to the contention on behalf of the defendants, that the action had been improperly conceived and brought. That the action should have been for damages for a refusal by the defendants, if they did refuse, to permit the plaintiffs to remove the property in question.

The second of the two questions was as to whether or not the rights of the plaintiffs to remove the property was gone by reason of what had occurred. This was mentioned and referred to as the "main question"; and, it seems to me, to amount simply to this: Whether or not the plaintiffs have now the right to remove the property.

Then, taking the second of the two questions first: It seems to me clear that unless the right to remove the machinery, etc., has been lost in some way, the present plaintiffs, being the owners of the property, have the same right to remove it as the original tenants had.

It was contended that this provision in the lease respecting the property in the machinery being and remaining in the lessees only states what is the law, that a tenant's fixture as a matter of law remains his property during the lease, and only becomes part of the freehold when he fails to remove it in proper time. I cannot think this is the law, and I think the authorities are clearly against the proposition. When a trade-fixture is attached or affixed to the freehold it becomes part of the freehold subject to the right of the tenant to remove it if he does so in proper time. In the meantime it is part of the freehold: Lord Hatherley in *Meux v. Jacobs*, L. R. 7 H. L. 481, at p. 490-1. But when the parties have made a special contract, as in the present case, they have, as is said by the late Mr. Justice Burns in *Dorey v. Lewis*, 18 U. C. R. at p. 30, defined and made a law for themselves on the subject.

Judgment. In the case *Ex p. Gould, Re Walker*, 13 Q. B. D. 454, the
Ferguson, J. provision called clause four in the lease was much like the one in the present case, if not precisely the same; and Mathew, J., in giving judgment, said, at p. 462: "The clause, therefore, is one which largely alters the common law rights of landlord and tenant. In my judgment it clearly makes the articles in question goods which are to belong to the lessees, and which they are to be entitled to remove upon the terms only of their making good all damage caused by the removal. They are to be the lessees' property without reference to the time at which they are removed, the only condition being that the lessees are to make good all damages done by the removal."

In that case there was a forfeiture of the term by bankruptcy; and it was held that, notwithstanding this, the official receiver was entitled to the articles mentioned in this clause of the lease.

It seems to me clear that the property in question was, owing to the provision in the lease, chattels, and the property of the lessees; that it continued to be their property till they made the assignment for the benefit of creditors when it passed as chattels to their assignee who transferred it as chattels to Mrs. Gall, and that she transferred it as chattels to the plaintiffs. I am of the opinion that the forfeiture of the term did not affect the right to this property or the right to remove it.

If the lease had not contained this provision, or such a provision, the property upon being affixed would have become part of the freehold subject to the right of the lessees to remove it in proper time. *Meux v. Jacobs*, L. R. 7 H. L. 481, at p. 490-1, and the consequences of the forfeiture of the term might, as to the property, have been wholly different.

The case, so far as this question has concern, seems to stand thus: The plaintiffs have been shewn to be the owners of the property in question. Nothing has taken place to defeat their right to remove it, and they are, in my opinion, in good time so to do. Assume, then, that the defendants are the owners of the land, and there is the

simple case of one owning the land and the other owning the chattel property upon it, and say affixed to it with the right to remove it, rendering obedience to the agreement in the lease while so doing. Judgment.
Ferguson, J.

The answer to this second question which I have taken up first must, I think, be in favour of the plaintiffs. The right of removal of the property is not gone.

Then, as to the first of the two questions: It might, and probably would be a convenient thing for the defendants to hold and use the plaintiffs' property, leaving the plaintiffs to an action on the case for damages, in respect to the measure of which a wide door would be opened for the introduction of opinion evidence. This, however, is not what the plaintiffs want. They simply want their own property; and the question here, is not one of speculation as to a suit of another character, but as to whether or not this action can be sustained.

The contention against this was that the case does not fall under the provisions of the second section of the Act respecting replevin, R. S. O. ch. 55.

In support of this contention, it was said that it was not shewn that the property had been wrongfully taken or detained by the defendants. It was said and contended that no sufficient demand and refusal had been shewn.

The conveyance of the property, that is the land on which the property in question was, and is, from Miller to the defendants, was upon the 28th January, 1893. A letter was written by the manager of the Quebec Bank to Miller on the 2nd February, 1893. This was answered by Messrs. Canniff & Canniff, solicitors, who had been acting for the former company and for Miller, and were acting for the defendants. It rather appears that the manager of the bank did not then know of the conveyance from Miller to the defendants; but Canniff & Canniff did know of it, and had drawn the conveyance. In this answer, these solicitors say: "We are instructed to notify you that all the machinery in question belongs to the landlord and is claimed by him." It then makes an offer and says:

Judgment. "This proposition is made without prejudice to the right of the landlord to claim that the property is his, which right he will set up if proceedings are taken for the recovery of the machinery."
Ferguson, J.

A. R. Williams had instructions from the bank on the 8th of February, 1893. One Kuhlman was then in possession, representing the defendants. Williams applied to Kuhlman, and he, Kuhlman, refused to let him have the property without an order from Canniff. He said he would not give up anything without an order from Canniff. Williams then went to Canniff and he refused "point blank" to let him have possession of anything without giving any reason whatever.

I may say here that I do not think there is any room for saying that the parties did not perfectly understand one another; or that the property alluded to, was the whole of the machinery, etc., about which the present action is; and I think it plain that the defendant, being in possession of and using the plaintiffs' goods and chattels, and being asked for them, asserted title in themselves; and not only so, but they warned the plaintiffs that if proceedings were taken they would set up such title or alleged title.

Then there are the written demands made which speak for themselves. These were before action. It was said that the one of these, principally relied on, did not specify all the chattels or property. It seems to me that this defect, if it is assumed that there was a defect, was cured by an order afterwards made in Chambers, and I do not deem it necessary to pursue this immediate matter further here.

It was further contended that the demands were for the wrong thing; that they should have been for leave to remove the property in accordance with the provision contained in the lease.

Now when one places himself in the position of the parties at the time, and looks fairly at what was done, the only conclusion, as it appears to me, is that what was demanded was what the defendants contend should have been demanded.

What was meant by the demand was possession *sub- modo* of the goods, that is, the privilege of taking and removing the property pursuant to the provision, in that regard, in the lease. It seems to me that it cannot be contended with any force that anything different from this was intended by the plaintiffs or understood by the defendants. And the defendants cut off all explanation, if any were necessary, by their assertion of title to the property in themselves.

Judgment.

Ferguson, J.

It is to be borne in mind that the property in question was not and is not "fixtures," so as to be part of the freehold, but goods and chattels, the property of the plaintiffs in the defendants' possession.

I can arrive at no conclusion but that the evidence is sufficient to shew a wrongful detention of these goods of the plaintiffs by the defendants, and this having been done in a manner and with an intention inconsistent with the proprietary title as owner of the true owner (the plaintiffs, as I think), the detention amounts to a conversion of the property. Further, I am of the opinion that when the defendants, through their solicitors, asserted title to the property in themselves, this was, in the circumstances, sufficient evidence of the wrongful detention.

I am of the opinion that this action does lie: that the plaintiffs, though they may have had another sort of action, were not obliged to resort to it; and that the answer to the first of the two questions must also be in favour of the plaintiffs.

[The learned Judge then set out certain other matters of detail to be considered, which are not necessary to be reported and continued:]

The two questions, called the main questions, are answered and determined in favour of the plaintiffs.

It is, I apprehend, too soon to say anything as to costs, and for safety, the question of costs is reserved, to be determined in any manner that counsel may agree upon. If no agreement, an application will be made to myself in Chambers, or whenever I may sit, if at all, in any other branch of the case.

[CHANCERY DIVISION.]

MILNE v. MOORE.

*Administration—Domicil—Domestic and Foreign Creditors—Priorities—
Con. Rule 271.*

In the administration of the Ontario estate of a deceased domiciled abroad, foreign creditors are entitled to dividends *pari passu* with Ontario creditors.

Re Kløbe, 28 Ch. D. 175, followed.

Con. Rule 271, which came into force since the above decision, and which relates to service of initiatory process out of the jurisdiction, if applicable at all to such a case, merely relates to procedure, and does not affect a proceeding in which all the parties have attorned to the jurisdiction of the Court.

Statement. THIS was an appeal from the certificate of the Master at Hamilton, in administration proceedings.

January 11, 1894. *W. R. Riddell*, for the appeal. The New York creditors must first rank on the fund in New York before they can rank on the fund here. The learned master thought he was bound by the case of *Re Kløbe*, 28 Ch. D. 175, and held that the creditors in both countries were entitled to rank *pari passu*. The case of *Re Kløbe*, is quite distinguishable. It did not appear there that there were any foreign assets. In *Blackwood v. The Queen*, 8 A. C. 89, at pp. 92-3, it was held that foreign assets must be distributed with priority to the foreign creditors, and we are foreign creditors as regards the domicile of the testator which was in New York: see also *Re Armour*, 10 P. R. 448. The next distinction is that in an administration suit debts only can be proved that are enforceable by action, *i. e.*, are collectable by action; and the foreign creditors could not bring actions here: *Heath v. Meyers*, 13 C. L. T. 359; *Re Trenton*, 17 C. L. J. N. S. 189. The case of *Re Kløbe* was decided when Order 2, Rule 4 of the English Judicature Act was in force, which is the same as our old Rule 45, and which allowed service out of the jurisdiction when the subject matter of the action was either "land stock or other property" within the jurisdic-

tion. The English Rule now in force in Order 2, Rule 64, which is similar to our Consolidated Rule 271, sub-sec. (a) which modifies the old rule by leaving out the words: "stock or other property," and restricting the right to land": Wilson's Judicature Acts, 128,* which would prevent an action now being brought except in case of land, and the subject matter of the administration proceedings is not land. It has been held that an administration action would not save a claim which would otherwise be barred by the Statute of Limitations: *Re Cannon*, 13 O. R. 705; *Re Greaves*, 18 Ch. D. 551. Argument.

McBrayne, contra. The case of *Re Klæbe*, 28 Ch. D. 175, cannot be distinguished from the present one on the grounds claimed. The case clearly deals with the question of there being foreign assets. *Blackwood v. The Queen*, 8 A. C. at p. 92, and also a case of *Cook v. Gregson*, are referred to and distinguished, it being pointed out that these cases depended on the particular law of the foreign country which gave the foreign creditor a preference, and the courts of England merely saw that he did not thereby obtain a preference in the English courts. It is broadly laid down that foreign creditors are entitled to rank *pari passu*, with the English creditors; that it has always been the law of England that a creditor whether from the furthest north or the furthest south is entitled to be paid equally with other creditors in the same class. The rules of the Judicature Act apply merely to procedure, and do not affect the rights which creditors otherwise have. The principle is one of international law, and not of procedure: Westlake's Private International Law, 3rd ed. pp. 119, 120; Story's Conflict of Laws, 8th ed., sec. 513a; Pemberton on Judgments, 4th ed. pp. 212, 385; Foote's Private International Jurisprudence, 2nd ed., p. 293-4. But even if the Judicature Rules govern, the foreign debtor having come in and attorned to the jurisdiction the foreign creditors are entitled to maintain their claims. It is similar in effect to an appearance by a foreign debtor to an action brought against him here.

Argument. *Riddell*, in reply. The rules of international law cannot affect the jurisdiction of our Courts, and certainly what took place here cannot have the effect of an appearance entered by a foreign debtor.

January 12, 1894. FERGUSON, J.:—

Administration proceedings are going on before the Master at Hamilton, pursuant to an order of my brother Meredith made during the progress of the action. The administration has regard only to property of the testator in the Province of Ontario, which is all personal property.

The testator died possessed of property in the State of New York, which is also personal property. The testator was a foreigner, resident and domiciled in the State of New York up to the period of his death there. The executrix is also a foreigner, resident and domiciled in the State of New York. Probate of the will was granted to the executrix in the State of New York.

Probate of the will has also been granted to her in the county of Wentworth, in this country. There are creditors of the testator resident in this Province, and also creditors of the testator resident in the United States, and as is said all or almost all of these reside in the State of New York.

Claims having been filed before the learned Master by creditors resident in New York, and out of the jurisdiction, and also claims by creditors resident in this Province, an application was made by the plaintiff's solicitor for a direction that the claims filed by the creditors residing without the jurisdiction of the Court, should not be entitled to share in the assets within the jurisdiction of the Court, but that the same should be reserved for domestic creditors; and upon that application the learned Master directed and certified that creditors residing without the jurisdiction of the Court, were entitled to rank *pro rata* with domestic creditors in all the assets within the jurisdiction of this Court, following, professedly, the judgment.

in the case *Re Klæbe*, 28 Ch. D. 175 ; and from this Judgment.
certificate is this appeal.

Ferguson, J.

The contention of the appellant is, that that decision does not apply to this case, and that in the administration in this country the assets of the estate that are in this country should be first applied in satisfaction of the claims of creditors in this country, and that the direction or certificate of the learned Master is, therefore, erroneous.

The head note of the case relied on by the learned Master, is : " In the administration of the English estate of a deceased domiciled abroad, foreign creditors are entitled to dividends *pari passu* with English creditors."

I have perused the judgment again and again, and notwithstanding the ingenious arguments of counsel to the contrary, I cannot avoid being of the opinion (leaving out of the present case, for the time being, a question of another character, to which I will hereafter allude), that the case *Re Klæbe* has an application to this case, and that the learned Master was not in error in following it.

In that case, the learned Judge, in his somewhat elaborate judgment, deals with a number of cases that were said to conflict in some degree with the doctrine that he was laying down or adopting in the case before him ; and in his conclusion, he says that the law of England has always been that you must enforce claims in that country according to the practice and rules of the Courts there ; and that according to these a creditor, whether from the farthest north, or the farthest south, is entitled to be paid equally with other creditors of the same class ; and I may here refer to our own Act R. S. O. ch. 110, sec. 32, which is now well known by all practitioners.

In the absence of evidence shewing what the foreign law is, it is to be presumed that the law in the State of New York, bearing upon the subject, is the same as our own law ; and it is not to be presupposed that Ontario creditors would there be dealt with in a manner different from that in which foreign creditors are dealt with here, so that the Court need not now, and, indeed, cannot be

Judgment. astute to see that justice in respect to the whole estate is
Ferguson, J. done to all the creditors.

It is possible to find in text books upon private international law some passages apparently leading to a conclusion differing from the one in *Re Klæbe*, 28 Ch. D. 175, but I venture the opinion that it cannot be successfully contended that the learned Judge in that case, was not right when he adopts the passage in Westlake, section 102, and says it lays down the law correctly. That passage I need not repeat here, as the learned Judge gives it in full at page 177, and it is in precise accord with the conclusion at which he arrived.

I have taken occasion to examine the other cases and authorities referred to in the argument, and I have found nothing sufficient to persuade me that the doctrine of *Re Klæbe* is not correct, or that it is not applicable in the present case.

The other question to which I said I would allude, is this: The claims of the foreign creditors are for debts contracted abroad. This was said by both counsel; and it was argued that as according to our latest decisions where a debt is contracted abroad by two persons, both of whom were and are resident and domiciled abroad, the claimant cannot sustain an action in this country to recover a judgment for his demand, unless the same has relation to land in this country. This, however, depends upon the rules respecting procedure in regard to the service of papers. At the time *Re Klæbe* was decided, the Rules in this respect in England, were somewhat different, and so also were the Rules here. Both have since been changed, and both are now, I think, the same.

At that time in England the Rules were not so strict as to confine the rights of the foreigner domiciled and living abroad, to sustain an action upon a contract made abroad between him and another foreigner domiciled and resident abroad, to one respecting lands; and the contention was that, had they been so, the decision could not have been as it was, because that would be permitting a foreign

creditor to prove for and recover in administration proceed- Judgment.
ings, a demand for which he could not sustain an action in Ferguson, J.
the Courts.

This contention at first seems to possess some force, but it is always to be borne in mind that in such a case, if the defendant appears to the action, the decisions are that he thereby submits to the jurisdiction, and the action may then proceed without objection; and in the present case all parties are before the learned Master, and no one is objecting to the jurisdiction of the Court.

I do not see that the Rules as to service that bring about the conclusion against a foreigner maintaining, in the circumstances above mentioned, his action, apply to the present case at all, but if the other view were taken, I think the answer above sufficient.

I am of the opinion that the view taken by the learned Master was right, and that his direction or certificate should be sustained.

The appeal should be dismissed, and I think, with costs.

Appeal dismissed with costs.

G. F. H.

[COMMON PLEAS DIVISION.]

CALDWELL V. MILLS.

Master and Servant—Workmen's Compensation Act—R. S. O. ch. 141—Negligence—Defect in Way—Superintendence—Use of Plank for Purpose not Intended.

The foreman of the defendant, a contractor for the erection of a building, desiring to pry up a part of the flooring, placed a new plank, supplied by the owners of the building, about eleven feet long by eight inches wide and three inches thick, which the evidence shewed had a knot in it two inches wide, and was cross-grained, across an opening in the ground floor, intending to use it as a fulcrum. The plaintiff, a labourer carrying a heavy scantling, was directed by the foreman to place it in another part of the building, and while crossing the plank to do so, was precipitated into the cellar by the breaking of the plank at the knot, and was injured. It did not appear that there was any way beyond the plank :—

Held, that the plank was a "way" within the meaning of sub-section 1 of section 3 of the Workmen's Compensation for Injuries Act, and that the knot and cross-grain were defects in the way, for which the defendant was responsible.

Statement.

THIS was an action under the "Workmen's Compensation for Injuries Act," R. S. O. ch. 141, brought by the plaintiff, a labourer in the employment of the defendant, a contractor. The defendant had a contract for the erection of an addition to the dye house of the Hamilton Cotton Mills Company. The building had been partly erected and a portion of the flooring put down, when it was discovered that the planks had not been laid "tongued and grooved," as required by the contract, and in consequence, it became necessary to pry them up. To do this one Whitlock, the defendant's foreman, placed a plank ten or eleven feet long by eight inches wide and three inches thick across an opening in the flooring, a short distance from the portion to be pried up, with the intention of using it as a fulcrum. This plank extended from one beam to another, and rested at one end on some bricks placed by Whitlock to bring it up to the level of the other end. The plaintiff, according to his own evidence, was told by Whitlock to take up a piece of scantling and "to carry it right over there," pointing to the north side of the building. The

plaintiff, to reach his destination, while carrying the scantling stepped on the plank, intending to cross over. He had taken a couple of steps on the plank, and was about to take a third, when the plank suddenly broke, and he was precipitated into the cellar, some four feet in depth, and was injured. Statement.

From the evidence of the plaintiff's witnesses it appeared that the plank, a new one, had broken where there was a black knot in it, about two inches wide, and that it was cross-grained, and there was some evidence that the plank was a cull from the boards selected for the flooring. The plaintiff himself said that the plank looked safe and stout enough to walk on. It did not appear that there was anything in the nature of an extension beyond the plank so as to enable the plaintiff to go beyond it.

The evidence for the defence was that a fellow-workman of the plaintiff had thrown a scantling which he was also carrying, and that it fell short of the place to which he had intended to throw it, and falling on the plank as plaintiff was crossing, broke it. It also appeared that the lumber for the contract was supplied by the Cotton Mills Company, the defendant being paid by a percentage on the expenditure.

The action was tried at the Hamilton Spring Assizes, on 4th and 5th May, 1893, before MACMAHON, J., and a jury.

Nesbitt, Q.C., and *Bicknell*, for plaintiff.

Osler, Q.C., for defendant.

The learned Judge left questions to the jury, which, with the answers, were as follows :—

1. Was the plank defective as a way or part of the plant, and if so what was the defect? A.—The plank was defective as a way in that it was cross-grained and had a knot in it.

2. Was Caldwell directed by Whitlock to cross the plank with the scantling? A.—Yes.

Statement.

3. Was the plank capable of carrying the plaintiff and the scantling across? A.—No.

4. What caused the plank to break off? A.—Weight of Caldwell and scantling.

5. If you find a defect existed, was it known to the defendant, or had it not been discovered owing to the negligence of the defendant or some person entrusted by him with the duty of seeing that the condition of the plant and ways were in a proper condition? A.—It was known to the defendant that the plank was defective in that he noticed the knot in it; his failure to discover further defects was due to his negligence.

6. If you find the plaintiff was entitled to recover, at what do you assess the damages? A.—We find the plaintiff entitled to recover damages to the amount of \$75.

The learned Judge thereupon gave judgment for the plaintiff for the amount of the verdict with county court costs.

The defendant moved on notice to set aside the judgment entered for the plaintiff and to have judgment entered in his favour.

In Michaelmas Sittings, December 3rd, 1893, before a Divisional Court, composed of GALT, C. J., and ROSE, J.

Osler, Q. C., supported the motion. There is no liability imposed on the defendant. If there is any liability at all it is on the Cotton Company; the company were constructing the building, furnishing the material, and paying the expenditure; the defendant merely being paid a commission. He had nothing to do with the material, and therefore could not be held responsible for the quality of it. In any event, so far as appeared, the plank was perfectly sound; and the cause of its breaking was the fact of the scantling being thrown on it, for which the defendant is not responsible: *Heaven v. Pender*, 11 Q. B. D. 503 *Thomas v. Quartermaine*, 18 Q. B. D. 685, 688. The plank

was not a way within the meaning of the Act. It was not intended to be used as a way, or for the purpose of walking on, or as flooring, or staging, but as fulcrum for the scantling to raise the flooring. There was no necessity for the plaintiff to use it. He might have gone round by the floor. The word "way" must have some definite meaning. It must be something held out and intended to be used as a way, and a temporary user of the plank by walking on it on one occasion would not constitute it a way. The plank also would not come within the definition of "plant." Plant means the apparatus used in some business, and it cannot be argued that the plank here was any part of the apparatus used in the construction of the building: *Kiddle v. Lovett*, 16 Q. B. D. 605; *Heaven v. Pender*, 11 Q. B. D. 503; *Yarmouth v. France*, 19 Q. B. D. 638; *Jones v. Burford*, 1 Times L. R. 137; Holmested's Workmen's Compensation for Injuries Act, pp. 35, 46. Argument.

Nesbitt, Q. C., contra. The evidence shews that the defendant was the person whose duty it was to select the material, and was responsible for the work being done, and who hired the workmen. The evidence also shews that he instructed the plaintiff to use this plank for the purpose of walking on it. It was the defendant's duty to see that the plank was capable of bearing the weight put on it; while the evidence shewed that it was wholly unfit for the purpose, being cross-grained and having a large knot in the centre, which seriously weakened it, and which the defendant had he examined it must have discovered. The evidence disposes of the contention that the scantling had anything to do with the breaking of the plank: *Wild v. Waygood*, [1892] 1 Q. B. 783; *Williams v. Eady*, 10 Times L. R. 41; *Conway v. Clemence*, 2 Times L. R. 80; *McGiffin v. Palmer*, 10 Q. B. D. 5; Holmested's Workmen's Compensation for Injuries Act, p. 33. The plank was a "way" within the Act. The defendant instructed the plaintiff to use it as such, namely, to walk on it. To constitute a way, it is sufficient if it is a place used by the workman in the performance of his duty in passing from

Argument. one part of the premises to another. It is not necessary that it should be habitually used as such ; it is enough if so used on one occasion merely: *Willetts v. Watt & Co.*, [1892] 2 Q. B. pp. 92, 98 ; Holmested's Compensation for Injuries Act, pp. 27, 34, It is also plant within the Act. " Plant " means something used in construction, which was the use the plank was being put to here : *Wild v. Waygood*, [1892] 1 Q. B. p. 783.

December 30, 1893. ROSE, J. :—

It seems to me clear that the plank in question was not only literally a " way," but was a way within the meaning of the cases. It was placed in its position to be used as a fulcrum, but the moment for such user had not arrived, and prior to its being so used it was, under the directions of the defendant's foreman, used by the plaintiff as a way over which he was to pass so as to execute his master's orders. That it was to be used only temporarily as a way can, in my opinion, make no more difference than that the use of it by the plaintiff was the first user of the kind. What was intended by the statute was that it should apply to such places as a workman or servant should be called upon to pass on or over in the performance of his duty. I refer to the cases, which I have considered, collected in Mr. Holmested's Workman's Compensation for Injuries Act (1892), pp. 27 to 34.

Then, assuming the plank to be a way, there was evidence to go to the jury of a defect in such way, and such a defect as was not merely temporary or accidental, but apparent and permanent. If I had been finding the fact I should have hesitated in saying that the error in judgment of the foreman was evidence of negligence, but the jury evidently were of the opinion that it was the duty of the foreman to examine the plank, and that had he sufficiently examined it he would have known that, having regard to the span, the width of the plank, the knot and the grain, it was not safe for the plaintiff to use as directed.

The foreman placed it in position ; he knew the use to which he intended it should be put ; and I cannot say, as a matter of law, that to place such a plank in position without examining it so as to ascertain its condition, or, if he knew its condition, to direct the plaintiff to use it as a way upon which he should pass carrying a burden, was not evidence of negligence, especially in view of the fact that the board or plank may have been a cull.

Judgment.

Rose, J.

If I felt strongly as to this finding of the jury I do not see that we could do more than direct a new trial, which, in view of the smallness of the damages awarded, would not be, in my opinion, a wise exercise of discretion.

Nor do I see how we can interfere with reference to the evidence of Cheeseman as to the breaking of the plank being caused by his throwing upon it the scantling he was carrying. The plaintiff did not realize it if it struck the plank prior to its breaking. His evidence is not consistent with such being the cause, for he experienced a " creaking " when he took the second step forward, and it did not break until the third step was taken. Nor did Hale's evidence confirm Cheeseman's statement. The occurrence occupied only a moment of time, and it is simply impossible on the evidence to say that the finding of the jury as to the cause of breaking was wrong.

I cannot accede to the argument that under *Heaven v. Pender*, 11 Q. B. D. 503, the defendant is not liable. He hired the plaintiff and other workmen ; they were under the direction of Whitlock, his foreman ; he, through his foreman, constructed the way ; the foreman knew the purpose for which it was to be used, and *Heaven v. Pender* seems to me a direct authority that, the defendant's servants constructing the way for the plaintiff's use, he, the defendant, would be liable to the plaintiff for any damage suffered from neglect in such construction. Whether the defendant's remuneration or payment was to be by commission or how, otherwise, seems to me to make no difference.

Judgment.

Rose, J.

On all the grounds the motion must, in my opinion, fail and be dismissed with costs. The damages are certainly very moderate indeed.

GALT, C. J., concurred.

G. F. H.

[QUEEN'S BENCH DIVISION.]

MCDONELL V. MCDONELL ET AL.

Will—Devise—Life Estate—Remainder—Vested Estate—Period of Vesting—Trust—Conversion into Personalty—“Pay or Apply.”

Devise of land to widow for life for the support of herself and testator's children, with power to sell, etc., as she might think proper for the general benefit and purposes of his estate; and upon her death, devise of such part of land as might remain undisposed of to trustees to stand seized and possessed of for the benefit of testator's children, in equal shares, and to pay to each his share at majority; with a provision that upon the death of any child before majority without issue, the trustees were to pay or apply his share to and among the survivors:—

Held, that the estates of the children became equitably vested upon the death of the testator, subject to the mere powers for sale contained in the will; and so vested as realty, for there was no trust which required, and the use of the words “pay” and “pay or apply” did not work, a conversion of realty into personalty.

THIS action was brought to determine the rights of certain persons claiming under the will of James McDonell, who died at the city of Toronto, where he was domiciled at the time of his death, on the 6th February, 1865, leaving surviving him:

1. His widow, Margaret Leah, who died in November, 1892, never having remarried.
2. His son Samuel Smith McDonell, the plaintiff.
3. His son James G. McDonell, one of the defendants.
4. His daughter Emily Isabella McWilliams, one of the defendants, who was over twenty-one years of age and the wife of W. G. McWilliams.

5. His daughter Jessie, who married the defendant Statement.
Arthur Bagshaw Harrison on 7th December, 1876, being then over twenty-one years of age, and died 18th November, 1885, intestate and without issue.

6. His daughter Margaret J., who married the defendant Beverley Robinson on 3rd September, 1873, being then over twenty-one years of age, and died 13th February, 1875, intestate, and leaving an only child, the infant defendant Margaret Mary Robinson.

The defendants Harrison and Robinson were duly appointed administrators of the estates of their respective wives.

Probate of the will was granted to the widow, Margaret Leah McDonell, on 24th February, 1865.

The will, so far as it affected the question dealt with in the portion of the judgment printed below, was as follows :

“ I bequeath unto my beloved wife, Margaret Leah McDonell, all my personal estate, and the further sum of £1,200 to be raised for her out of my real estate, to and for her own absolute use forever, and I devise all my real estate unto my said wife during her natural life and widowhood for the support of herself and the support and education of my children ; with power to sell, lease, mortgage, or exchange the same as she may think proper for the general benefit and purposes of my estate.

And upon the death or marriage of my said wife, I devise my said real estate, or such part thereof as may remain undisposed of, unto my friends A.W. and J. L. R. in trust for the following purposes, that is to say, to pay to my said wife the yearly sum of £300 of lawful money, after any future marriage, during the residue of her natural life, but not by way of anticipation, and to stand seized and possessed of the remainder of my estate for the benefit of my children, in equal shares, and to pay to each of them his or her share upon his or their respectively attaining the age of twenty-one years, or, if a daughter or daughters, upon her or their marriage, whichever event shall first happen.

And upon the death of any of my children under the

Statement. age of twenty-one years and without leaving lawful issue surviving them, to pay or apply the share or shares of such deceased child or children to and among the survivors of my said children, but if any of my said children shall die leaving a child or children lawfully begotten surviving, then the child or children so surviving shall take the share or shares of his, her, or their deceased parent or parents in like manner as if such parent or parents had been actually possessed of his, her, or their share or shares."

By a codicil the plaintiff was appointed trustee in the stead of those named in the will.

The facts were not in dispute.

The action was tried before STREET, J., without a jury, at Toronto, on 27th December, 1893.

Wallace Nesbitt and *R. McKay*, for the plaintiff.

Moss, Q.C., and *H. J. Wright*, for the defendant Mrs. McWilliams.

Osler, Q.C., and *J. Hoskin*, Q.C., for the infant defendant.

Watson, Q.C., and *Musten*, for the defendant James G. McDonell

C. C. Robinson and *T. H. Lennox*, for the defendant Robinson.

H. T. Beck, for the defendant Harrison.

January 8, 1894. STREET, J.:—

I am of opinion that the estates of the children became vested upon the death of the testator, in accordance with the well known general rule that where a testator creates a particular estate, and then goes on to dispose of the ulterior interest expressly on an event which will determine the prior estate, the words descriptive of such event occurring in the latter devise will be construed as referring merely to the period of the determination of the possession or enjoyment under the prior gift, and not as designed to postpone the vesting: *Jarman on Wills*, 5th ed., p. 756.

The scheme of the present will is reasonably clear; there

is a devise of the real estate to the widow for life or during her widowhood, with remainder in fee to a trustee in trust for the children, to which is added a clause divesting the interests of such of the children as should die under twenty-one without issue, which does not, in my opinion, affect the previous words or prevent the vesting from taking effect. I think, therefore, that the general rule must govern and that the interests of the four children must be taken to have vested in them upon the death of the testator: *Phipps v. Ackers*, 9 Cl. & F. 583; *Stanley v. Stanley*, 16 Ves. 491; *Holtby v. Wilkinson*, 28 Gr. 550.

It was contended by counsel for the defendants Harrison and B. Robinson that under the terms of the will an equitable conversion of the real estate into personalty must be held to have taken place, and that the shares of the children had vested as personalty and not as realty. The ground for this contention is found in the direction of the trustee to "pay" to each child his or her share, and to "pay or apply" the share of a deceased child who has not left lawful issue, to and among the surviving children.

The rule is that in order to work a conversion of realty into personalty an imperative trust or direction to sell must be gathered from the terms of the will, not necessarily express, but at all events to be necessarily implied from its terms: *Hyett v. Mekin*, 25 Ch. D. 735. I have gone carefully through the cases cited to me upon this question and many more, and I can find no case in which a mere power of sale has been construed as a trust for conversion unless the duties imposed upon the trustee were inconsistent with the presumption that the real estate should continue to retain that character. An excellent illustration is furnished by the case of *Cornick v. Pearce*, 7 Ha. 477, where a trust for sale of a moiety was implied, in the absence even of an express power to sell, from the fact that the trustees were directed "to place that moiety out on government or real securities," but the remaining moiety was held to retain its character of realty. Here was a trust which could not be performed without a conversion,

Judgment.

Street, J.

Judgment. and it was therefore held that a conversion must have
Street, J. been intended. In *Minors v. Battison*, 1 A. C. 428,
a trust for sale was implied from the nature of the trusts,
and the fact that any other construction would prolong
indefinitely the vesting of the shares. In *Ward v. Arch*,
15 Sim. 389, the Vice-Chancellor, after arriving at the con-
clusion from the terms of the will that there was an abso-
lute direction to sell, quotes a clause in the will which
speaks of the shares as "due and payable," and asks "who
ever heard of shares of real estate becoming due and pay-
able?" But this phrase is quoted not as the basis of the
judgment, but as an additional circumstance shewing the
testator's meaning. See also *Mower v. Orr*, 7 Ha. 473;
Greenway v. Greenway, 2 D. F. & J. 128; *Henry v. Simp-*
son, 19 Gr. 522; *In re Hotchkys*, 32 Ch. D. 408, 416.

There is no trust in the present will which requires a con-
version, unless it be held that the direction to "pay" the
shares means to pay them in money. It is to be remem-
bered that the will is not accurately or skilfully drawn, and,
while it is quite possible, on the one hand, that the testator
had in his mind the idea that his real estate would be sold
before the time for division arrived, it is, also, quite possible
that in directing his trustee to pay to the children their
shares, he was using the word in that wide and perhaps
loose sense in which it is not unfrequently used when it is
made to apply to other things than money. I think a not
unfair test of the force to be given to the word would be to
consider whether a constructive conversion into money
would take place under a simple devise of land to A. for
life, with remainder to B. and his heirs in trust for the
children of A., coupled with a direction to B. to pay to each
child his share as he reached the age of twenty-one
years, and without any express power of sale in B. In my
opinion, the force of the word "pay" here would be satis-
fied by a division and allotment of his share in land to each
child as he attained the prescribed age. I think that under
this will each child's share became equitably vested in him
or her as land upon the death of the testator, subject to the

mere powers for sale contained in the will, and that there is nothing to be found in the will of sufficient force to deprive of its character of land any land which remained unsold at the death of the widow, when all that remained for the trustee to do was to divide the estate.

Judgment.

Street, J.

[The remainder of the judgment is not reported, being of importance only to the parties.]

E. B. B.

[QUEEN'S BENCH DIVISION.]

RE KERR V. SMITH.

Prohibition—Division Court—Action upon Order in High Court for Payment of Costs—Judgment—Rules 866, 934.

Prohibition granted to restrain the enforcement of a judgment in a Division Court in an action brought upon an order of a Judge in an action in the High Court ordering the defendant in the Division Court action to pay certain costs arising out of his default as a witness.

Notwithstanding the broad provisions of Rule 934, an order of the Court or of a Judge is not for all purposes and to all intents a judgment; and no debt exists by virtue of such an order as was sued on here.

Rule 866 means that an order may be enforced in the action or matter in which it is, as a judgment may be enforced, and does not extend to the sustaining of an independent action upon the order.

MOTION by the defendant for prohibition to the first Division Court in the county of Kent, to restrain proceedings upon a judgment in favour of the plaintiff, on the ground of want of jurisdiction in the Division Court to entertain this action, which was brought by the assignee of one Deimel of a claim against the defendant. This claim was upon an order made in an action in the High Court of *Deimel v. Smith*, which ordered the defendant in the Division Court action to pay to Deimel, the plaintiff in the High Court action, a certain sum for costs arising

Statement.

Statement. out of the fact that Smith, the defendant in the Division Court action, had made default as a witness subpoenaed to give evidence upon a pending motion. The defendant in the Division Court action was merely a witness in, and not a party to, the High Court action.

The motion was argued before FERGUSON, J., in Chambers, on the 12th January, 1894.

W. H. Blake, for the defendant. An order for the payment of costs is not a judgment which can be sued on in the Division Court. I refer to Rules 866 and 887; *Sheehy v. Professional Life Assurance Co.*, 2 C. B. N. S. at p. 256; *Emerson v. Lashley*, 2 H. Bl. 248; *Dent v. Basham*, 9 Ex. 469; *Hookpayton v. Bussell*, 10 Ex. 24; *Patrick v. Shedden*, 2 E. & B. 14; *Cremetti v. Crom*, 4 Q. B. D. 225; *Ex p. Moore*, 14 Q. B. D. 627; *Re Alexander*, [1892] 1 Q. B. 216; *Re Riddell*, 20 Q. B. D. at p. 320; *Ex p. Schmitz*, 12 Q. B. D. 509. Again, the plaintiff has no right to sue at all; there was no debt to assign.

E. D. Armour, Q. C., for the plaintiff. The defendant went on with the trial and took his chances. The order for costs in the High Court does not shew the amount of costs. The plaintiff had to prove the taxation of the costs and the assignment to him. The defendant cross-examined the plaintiff as to why he had not issued execution. I submit he cannot so take his chances of a favourable verdict, and then, after judgment against him, apply for prohibition: *Re Soules v. Little*, 12 P. R. 533. The main question here is not whether the order was a final judgment, but whether a debt was created by the order: *Grant v. Easton*, 13 Q. B. D. 302; *Hodsoll v. Baxter*, E. B. & E. 884. Such an order as this may be proceeded upon in every way that a judgment can be proceeded upon: Rule 866. I rely on *Aldrich v. Aldrich*, 23 O. R. 374; 24 O. R. 124.

Blake, in reply, referred to Rule 934; *Troutman v. Fiske*, 13 P. R. 153; *Re Brazill v. Johns*, 24 O. R. 209; *Re Evans v. Sutton*, 8 P. R. 367.

January 27, 1894. FERGUSON, J. :—

Judgment.

Ferguson, J.

The motion is for a prohibition. In an action in the High Court wherein one Deimel was plaintiff, and one Smith was defendant, Deimel subpoenaed the above named Smith as a witness, and Smith failed to attend; and such proceedings were had that Smith the witness was ordered to pay Deimel a sum of about \$50 costs arising out of the fact that he had made default as a witness duly subpoenaed. There was no question as to that order being a good and valid order of a Judge of the High Court. The above named plaintiff Kerr was the solicitor for Deimel in the action; and Deimel assigned this order to him, treating it in such assignment as a *chose in action*. I have not the papers before me, and I am stating the case as it was stated at the bar. There seemed to be no dispute as to the facts.

Kerr has brought the suit in the Division Court upon this order, treating it, no doubt, as a debt or money demand, duly assigned to him.

The contention of the defendant was that there was no debt to be assigned to Kerr, the order made against Smith not being or constituting a debt in favour of Deimel.

The decision in *Aldrich v. Aldrich*, 23 O. R. 374, that Division Courts have jurisdiction to entertain an action brought upon a judgment of the High Court, where the judgment of the High Court is a final judgment, was affirmed by the Divisional Court: 24 O. R. 124.

Where a judgment is a final judgment, the law implies a promise or contract by the defendant or party against whom the judgment is to pay the amount: *Hodsoll v. Baxter*, E. B. & E. 884; *Grant v. Easton*, 13 Q. B. D. 302, referred to at the bar; and *Aldrich v. Aldrich*, *supra*; and this implication arises even in the case of a foreign judgment. Where there is a promise or contract by implication of law, it is of the same force as an actual promise of contract; hence it is, as it appears to me, that there is a debt wherever there is a final judgment for the payment of money; and a judgment debt is a debt of a high degree

Judgment. The question, as stated at the bar, and I think rightly stated, was: Has this order made by a Judge against a witness, directing him, as aforesaid, to pay certain costs, such an effect as to constitute a debt owing from the witness to the party in whose favour the order was made?

Ferguson, J. During the argument reference was made to Rules 866 and 934 as being Rules bearing on the subject. Rule 934* seems to have been taken largely from the 10th section of chapter 67, R. S. O. 1887. The original of that section was enacted in the year 1859. It was a section in an Act passed to extend the provisions of the Act for the abolition of imprisonment for debt; and in the various revisions of the statute, this section is uniformly found in Acts respecting arrest and imprisonment for debt. An examination of the section will, as I think, shew that, broad as its provisions seem to be, it does not provide that an order of the Court is, for all purposes and to every intent, a judgment. It is to be deemed a judgment, etc., "within the meaning of this Act;" and the provision in the latter part of the section respecting Judges and officers of the Court having the same powers as in corresponding cases under the Act, indicates, as I think, most plainly that it was not the intention to provide that an order of the Court should for all purposes be a judgment; and I do not see that Rule 934 has the effect of extending the provisions.

The limiting words in this Rule are "within the meaning of the preceding Rules—" apparently substituted for the words in the section of the Act, "within the meaning of this Act—" and nothing is found in the "Act" in the one case, or in the "preceding Rules" in the other, having any reference to an action being brought or sustained upon an order of the Court.

*Every judgment or order of the High Court and of the County Court directing payment of money or of costs, charges, or expenses, shall, so far as it relates to such money, costs, charges, or expenses, be deemed a judgment, and the person to receive payment a creditor, and the person to make payment a debtor, within the meaning of the preceding Rules.

The Imperial enactment 1 & 2 Vic. ch. 110, sec. 18, may Judgment.
be said to be in *pari materia* with the section of our Ferguson, J.
Act above referred to.

Then, looking at the matter in this light, and no authority to the contrary having been referred to, I am of the opinion that the statute alluded to is not so comprehensive as to provide for the bringing and sustaining of an independent action at law, even upon an order of the Court, unless such order is embodied in a judgment of the Court so as to be itself a judgment, or part of a judgment, of the Court, in which case the implied promise or contract would exist.

The case, however, with which I am dealing is not one touching an order of the Court, but only a Judge's order for the payment of costs by a witness who made default.

It was not disputed that the Rules referred to above supersede the provisions of the Act, and whatever pretence there might be for saying or contending that an order of the Court is for all purposes a judgment (and I think there is none) there can, I think, be no ground for contending that an order of a Judge is such a judgment, or that a debt comes into existence upon such an order being made. The only ground on which counsel for the plaintiff in the Division Court, when arguing the motion before me, assumed was that by reason of the Judge's order for the payment of the costs a "debt" existed. On this immediate subject I think it needful to refer to only one of the many authorities cited by counsel for the defendant in the Division Court in his argument. That case is *Hookpayton v. Bussell*, 10 Ex. 24, decided in 1854. There the action was upon a Judge's order for the payment of money and costs, and the order had the advantage (if any advantage it was) of having been made upon consent, and all the Judges were clearly of opinion that the action could not be maintained. The Court said to the plaintiff that his action upon the order could not be maintained. 'This the Court could not, and would not, have said if the order had been or constituted a debt, because a debt is a thing (of all

Judgment. things) in respect of which a plaintiff has a right to bring
Ferguson, J. and maintain his action. The learned Judges pointed out
what the plaintiff's true remedy was, namely, by attachment, which was then the specific and appropriate remedy there for disobedience of an order. It seems to me clear and beyond doubt that the order sued on in the Division Court is not and does not constitute a "debt," as was contended.

Rule 866 is: "Every order of the Court or a Judge, whether in an action, cause, or matter, may be enforced in the manner as a judgment to the same effect."

It was suggested that this authorized the bringing and maintaining of an action upon the order in the present case, because, had there been a judgment to the same effect as the order, an action could have been maintained upon it. I am of opinion that this is a mistaken view of the Rule; that the words "may be enforced" must be taken to mean only that the order may be enforced in the action or matter in which it is as a judgment might be enforced; and that the meaning does not extend to or comprehend the sustaining of an independent action upon the order, because such an action might be sustained upon a judgment to the same effect as the order.

I am of the opinion that the learned Judge in the Division Court had no jurisdiction to entertain the action or suit upon the order, even if the suit there had been brought by the person in whose favour the order was originally made, and I need not, I think, say anything respecting the assignment of it, which treated it as a *chose in action*.

The order for the prohibition will go. The costs of this motion will be paid by the plaintiff in the Division Court suit.

E. B. B.

[CHANCERY DIVISION.]

MOYLE V. EDMUNDS ET AL.

Guarantee—Construction of.

A guarantee in the following words, "I hereby become responsible to H. M. for payment for goods sold to F. E. for feed store situate * * up to \$400," was given at a time when the debt due by F. E. to H. M. was \$280 85 :—

Held, that the guarantee covered the amount then due and an additional indebtedness up to \$400.

Chalmers v. Victors, 18 L. T. N. S. 481, followed.

Decision of ARMOUR, C. J., at the trial affirmed.

THIS was an appeal from a judgment of ARMOUR, C. J., *Statement.* Q. B., at the trial in an action brought on a guarantee by Henry Moyle as a creditor against Fred Edmunds the principal debtor, and J. E. Verral the guarantor.

The action was tried at Toronto on March 24th, 1893.

H. L. Drayton, for the plaintiff.

Biggs, Q. C., and *Swayzie*, for the defendant Verral.

It appeared that in May, 1892, the defendant Verral leased a store to the defendant Edmunds, and the plaintiff supplied goods to Edmunds on a guarantee given by Verral in the same terms as the one sued on, except that the limit was \$200. The monthly balance between May and October, 1892, due to plaintiff amounted to about \$200, but by the 13th of October it had increased to \$280.85, when on Edmunds wanting more credit, the plaintiff declined to give it unless he got a further guarantee. The plaintiff went to Verral and, as he said, agreed if he got a larger guarantee to give a larger credit. Verral alleged that he only agreed to guarantee the payment of the goods supplied to Edmunds up to that time, the amount of which plaintiff put at between \$300 and \$400. On the 13th of October plaintiff made out, and Verral signed a guarantee in these words :

Statement.

"Toronto, October 13th, 1892.

"I the undersigned do hereby become responsible to Henry Moyle for payment for goods sold to Fred Edmunds for feed store situated at 836 King street west, up to the sum of four hundred dollars, \$400.

"Witness, Henry Moyle. Sgd. "J. E. VERRAL."

After getting the guarantee, plaintiff supplied Edmunds with goods up to December 1st to an amount (including the then indebtedness of \$280.85) in excess of \$400, viz., \$539.22, and received payment for same to the extent of \$200. Although Verral contended that he only agreed to guarantee up to \$280.85, and that the guarantee was for a past consideration, and therefore void, he pleaded tender of \$80.85, the amount due on the 13th of October, less \$200 paid by Edmunds.

The learned Chief Justice reserved judgment, and subsequently delivered the following:

May 30th, 1893. ARMOUR, C. J.:—

The principle of construction applied to the guarantee in the case of *Chalmers v. Victors*, 18 L. T. N. S. 481, is equally applicable to the guarantee in this case, and the circumstances under which the guarantee in that case was given are so similar to the circumstances under which the guarantee in this case was given that I think that this case is governed by that. At the time the guarantee in this case was given, Edmunds was not indebted to Moyle in the sum of \$400, but only as I find in the sum of \$280.85, and this shews that the guarantee was intended to cover more than the then amount of the indebtedness of Edmunds to Moyle.

And if the guarantee is construed to apply only to the then indebtedness it would be void as being without any consideration, and it ought to be construed so as to be effective and not so as to be invalid.

Construing it to be an effective guarantee the question arises whether it is a guarantee unlimited in point of time

or whether it is a guarantee limited to the amount of the ^{Judgment.} then indebtedness and an additional indebtedness up to ^{Armour, C.J.} the amount of \$400, and I think it should be held to extend only to the then indebtedness and to so much of the future indebtedness for goods sold as should make up the sum of \$400, that is that it should be held to have been exhausted as soon as goods were sold by Moyle to Edmunds after the date of the guarantee to an amount which together with the then indebtedness amounted to \$400.

After the date of the guarantee Moyle went on selling goods to Edmunds to an amount exceeding with the then indebtedness of \$280.85 the sum of \$400, and Edmunds gave to Moyle cheques to the amount of \$250, one of which, however, to the amount of \$50 was dishonoured, making the amount paid by Edmunds to Moyle \$200, which being applied to the earlier items reduced the liability of the guarantor under his guarantee to the sum of \$200, for which amount I direct judgment against him with High Court costs.

I refer to *Haigh v. Brooks*, 10 A. & E. 309; *Butcher v. Stewart*, 11 M. & W. 857; *Goldshede v. Swan*, 1 Exch. 154; *Bainbridge v. Wade*, 16 Q. B. 89; *Hoad v. Grace*, 7 H. & N. 494; *Wood v. Priestner*, L. R. 2 Ex. 66.

From this judgment the defendant Verral appealed to the Divisional Court, and the appeal was argued on December 8th, 1893, before BOYD, C., and FERGUSON, and ROBERTSON, JJ.

Biggs, Q. C., and *Swayzie*, for the appeal. The trial Judge has found that the guarantee was not a continuing one, but he has found that it covered, not only the amount due at the time it was given, but up to a total amount of \$400. We contend, it does not cover any future debt over the amount due when it was given. The words used are "sold," not "to be sold." The latter words would have to be imported to sustain the judgment. The judgment is based on *Chalmers v. Victors*, 18 L. T. N. S. 481, but in

Argument. that case the amount of the guaranty had been arrived at, and more than that amount had been paid off, so it was held there was nothing due, and the judgment was given for the defendant. They referred to *Houl v. Grace*, 7 H. & N. 494; *Kustner v. Winstanley*, 20 C. P. 101; *Allnutt v. Ashenden*, 5 M. & G. 392; *Nicholson v. Puget*, 5 C. & P. 395; *Mellvile v. Hayden*, 3 B. & Ald. 593.

G. G. S. Lindsey, contra. Where there is any ambiguity in the guarantee, the Court will look at all the surrounding circumstances to ascertain what the parties meant. The evidence shews that the intention of the parties was, that the guarantee should cover goods supplied up to \$400. Although in *Chulmers v. Victors*, more than the amount guaranteed was subsequently paid, thus leaving plaintiff without a judgment in his favour, yet that cannot prevent the principle on which that case was decided from being applied here. If defendant Verral's contention be correct, there was no consideration for the guarantee, for although, by R. S. O. ch. 123, sec. 8, the consideration for a promise to answer for another need not be in writing, yet there must be a good consideration to support the promise. In this view of the facts, the guarantee would not be effective, but the rule is to construe the guarantee to be effective if possible. If the words used may import either a past or future consideration, the Court will construe them to mean future: *Heffield v. Meadows*, L. R. 4 C. P. 595; *Wood v. Priestner*, L. R. 2 Ex. 66; *Brown v. Batchelor*, 1 H. & N. 255; *Goldshede v. Swan*, 1 Exch. 154; and DeColyar on Guarantees p. 180. Where the words "goods supplied" occur, the Court will construe them to read "goods to be supplied:" *Houl v. Grace*, 7 H. & N. 494, affirmed in *Wood v. Priestner*. The case of *Nicholson v. Puget*, was overruled in *Mayer v. Isaac*, 6 M. & W., at p. 612. If there had been a cross appeal, I submit the plaintiff might have successfully contended, that the guarantee was a continuing one and that judgment should be increased to \$400. The fact that the guarantee was for more than the debt due at the date is evidence of the intention to

include goods to be afterwards supplied. That the guarantee is for more than the sum due at the time is presumptive of a continuing guarantee : *Hoad v. Grace*, 7 H. & N. 494. If the defendant means to be surety for a single dealing, he should take care to say so : *Merle v. Wells*, 2 Camp. 413. Argument.

Biggs, Q. C., in reply.

January 22nd, 1894. BOYD, C. :—

The strongest case supporting this appeal is *Allnutt v. Ashenden*, 5 M. & G. 392, and if that stood unshaken, it would have to be further considered. But I do not think it can be regarded as an authority detracting from the later decisions cited by the Chief Justice. It was referred to in *Wood v. Priestner*, L. R. 2 Ex. at p. 71, as a case not understood by Bramwell, B., and the notes appended to it by Mr. Sergeant Manning, indicate that it is not to be extended as an authoritative decision.

There was evidence given here for and against the applicability of this guarantee to past or to prospective dealings, and the Chief Justice has found that the most appropriate signification of the language as explained by the circumstances of the parties is not to limit it to the past.

So to limit it would make it merely a promise to pay an existing debt, but that was not all that was intended, having regard to the expression at the end "up to \$400." True the defendant explains this in one way, by saying that the exact amount of the then actual debt was not known to him, but the Chief Justice has preferred the different explanation given by the plaintiff.

Transposing the words it reads "for goods sold up to \$400, etc., I hereby become responsible," i.e., the sales may go to that aggregate, if not so already—and I agree to pay. There is no hardship in holding the defendant liable up to \$400, for that is the sum he is willing to guarantee, and in reading the paper under the circumstances as applicable to the goods then sold, and those about to be sold in all up to \$400; the authority of *Chalmers v. Victors*, 18 L. T. N. S. 481, applies.

The judgment should be affirmed with costs.

Judgment. FERGUSON, J. :—

Ferguson, J.

This appeal is from the judgment of the Chief Justice of the Queen's Bench Division.

The question—to use the language of counsel moving—is as to the proper construction of the guarantee sued on. The document is as follows :

“Toronto, October 13th, 1892.

“I the undersigned do hereby become responsible to Henry Moyle for payment for goods sold to Fred Edmunds for feed store situated at 836 King street west, up to the sum of four hundred dollars, \$400.

“Witness, Henry Moyle. Sgd. “J. E. VERRAL.”

There had been dealings between Moyle and Edmunds, and at the time of this guarantee there was the sum of \$80 owing by Edmunds.

It was contended on behalf of the defendant that only the then past indebtedness was guaranteed by this document.

The Chief Justice decided that it applied to both past and future indebtedness up to the sum of \$400, and the judgment was for the total amount that was shewn to be owing, including the \$80, such total sum being less than the \$400. The decision was upon the authority of *Chalmers v. Victors*, 18 L. T. N. S. 481, which seems well in point, though counsel successfully pointed out some distinctions between the circumstances of that case and the present case.

I have examined the authorities relied on by the defendants' counsel, *Kastner v. Winstanley*, 20 C. P. 101; *Allnutt v. Ashenden*, 5 M. & G. 392; *Morrell v. Cowan*, 7 Ch. D. 151; *Melville v. Hayden*, 3 B. & Ald. 593, and *Hoad v. Grace*, 7 H. & N. 494, and I have also endeavoured to find authority more closely governing the case in hand, but without success.

The strongest authority in favour of the defendants' contention that I have seen is the case of *Allnutt v. Ashenden*, above cited on his behalf. The guarantee in that case was :

"SIRS,—I hereby guarantee Mr. John Jennings' account with you for wines and spirits to the amount of £100." Judgment.
Ferguson, J.

There was at the time of giving this document an existing account against Jennings for wines and spirits, the amount of which was £83.1s.; the supply of wines and spirits being the only transactions that the plaintiffs and Jennings had had up to the time the guarantee was given. It was held that the guarantee was an undertaking merely to be answerable for the then existing account. The decision turned, however, upon the meaning given to the word "account." Tindal, C. J., said at p. 397: "By account I understand the parties to mean some account contained in some ledger or book; and the case shews that there was such an account existing at the time." Although the others of the learned Judges did not use this language it seems clear that it was upon this view or this view chiefly that the case was decided.

Some annotator seems to have taken the liberty of suggesting that if mercantile witnesses had been sworn they would probably have concurred in stating that the word "account" in that guarantee would be understood in the commercial world as equivalent to the word "dealings."

Such, however, being the reason of the decision, I fail to see how it can be said to support the contention of the defendant here, so as to enable one to say that the learned Chief Justice was in error in adopting the course and deciding as he did.

The other cases relied on when examined really do not appear to me to bear on the question to be determined.

It has been said that on questions of this character, it can scarcely be expected that authorities in point can be found; that no set of words used in certain surrounding circumstances can be found and considered to mean the same as another set of words employed in other and different surrounding circumstances, and that one is driven to ascertain, as well as he can, what the parties really meant, not what they may say they meant when

Judgment. difficulty and contention arises, but what was meant by
 Ferguson, J. the words employed in the circumstances in which they
 were written; all of which circumstances, it is proper to
 know when endeavouring to ascertain the real meaning:
 and looking at the present guarantee in this way, I am not
 able to say that I perceive anything that forbids the view
 taken by the Chief Justice, or that I think he was in any
 degree wrong in taking the course he did take.

I think the judgment should be affirmed.

ROBERTSON, J., concurred.

G. A. B.

[COMMON PLEAS DIVISION.]

SAMUEL ET AL. V. FAIRGRIEVE ET AL.

*Bills of Exchange and Promissory Notes—Transfer of Patent—Part Con-
 sideration “Given for Patent Right”—53 Vic. ch. 33, sec. 30, sub-sec.
 4 (D.).*

Where part of the consideration for the transfer of a patent right from
 one partner to another was the giving, at the plaintiffs' suggestion, of
 the notes of the firm for the individual debt of the transferor to the
 plaintiffs:—

Held, that under sub-section 4 of section 30 of the Bills of Exchange
 Act, 53 Vic. ch. 33 (D.) the words “given for a patent right,” should
 have been written across the notes so given: and in the absence
 thereof, the plaintiffs could not recover.

Statement. THIS was an action tried before ROBERTSON, J., at
 Toronto, at the Autumn Chancery Sittings of 1893.

The action was on three promissory notes made by the
 defendants, payable to the order of the plaintiffs, namely,
 one for \$300 payable twelve months after date, and two
 for \$350 each, payable eighteen and twenty-four months,
 respectively, after date. The defence was that part of the
 consideration for the notes was the assignment of a

patent right, and that the notes should have had the words "given for a patent right" endorsed thereon. Statement.

The facts are fully stated in the judgment of MACMAHON, J.

The learned trial Judge found in favour of the plaintiffs.

The defendant Craig moved on notice to set aside the judgment entered for the plaintiffs, and to have it entered in his favour.

In Michaelmas Sittings, December 1st, 1893, before a Divisional Court, composed of GALT, C. J., ROSE and MACMAHON, JJ., Moss, Q.C., and Thompson, supported the motion. The consideration for the notes was the assignment of an interest in a patent right, and they, therefore, should have had endorsed thereon the words "given for a patent right," as required by sub-sec. 4 of sec. 30 of "The Bills of Exchange Act, 1890," 53 Vic. ch. 33 (D.): Maclaren's Bills of Exchange Act, p. 203. In *Girvin v. Burke*, 19 O. R. 204, this Court held that the section of the Act then in force, sec. 12 of R. S. C. ch. 123, did not apply as between the maker and the payee. This was affirmed on appeal, but, the Court of Appeal were of opinion that the Act applied to a transferee with notice. In consequence of this judgment the section was amended so as to make it apply in all cases except that of a holder without notice. The learned Judge at the trial seemed to think that the fact of the sale of the patent right being from Fairgrieve to Craig, and not from the plaintiffs, took the notes out of the Act, but the Act makes no such distinction; and, as a matter of fact the plaintiffs were the persons who suggested, and were the real parties in, the transaction. There is no question but that they had knowledge of the assignment of patent right being the consideration for the notes, and this in itself is sufficient to bring the case within the Act: *Johnson v. Martin*, 19 A. R. 592.

[It was further argued that there was no consideration for the notes, but as the judgment does not proceed on this ground, the argument is not reported.]

Argument.

Parkes, contra. The statute does not apply. The plaintiffs were no parties to the assignment of the patent right. It was assigned, not at their instance, but at that of Craig, and this takes the case out of the Act. It is not sufficient merely that the transferee should have notice; he must be a party to the transaction. But in any event the assignment of the patent right was not the whole consideration; there was the advance of \$200 made by the plaintiffs, and this constituted a good consideration in itself. If, after the notes had been given to the plaintiff, the defendant Fairgrieve had refused to assign the interest in the patent right, this would constitute no defence to an action on the notes.

Moss, Q. C., in reply. The statute applies whether the consideration is in the whole, or in part, the assignment of the patent right. See sec. 2, sub-sec. (g) defining "holder," and sub-sec. (i) defining "issue."

December 30, 1893. MACMAHON, J.:—

The defendant Fairgrieve, had been in business on his own account prior to Craig becoming his partner on the 1st November, 1890, when he, Craig, put \$1,600 into the business, which was thereafter carried on under the firm name of "Fairgrieve & Craig."

At the time of the formation of the partnership, Fairgrieve was indebted to the plaintiffs on his personal account to the amount of at least \$1000, for which the plaintiffs desired to obtain the notes of the firm of Fairgrieve & Craig, and in order that Fairgrieve might be authorized to give the firm's notes, it was suggested by Mr. Benjamin, one of the plaintiffs, that Craig should purchase a half interest in a patent of which Fairgrieve was the owner. The terms are set out in an agreement under seal between Fairgrieve and Craig, dated the 18th of March, 1891, as follows: "Whereas on or about the 3rd day of March, 1891" (the day on which the notes were given), "the said Fairgrieve agreed to sell and the said Craig agreed to

buy a half interest in the said Canadian Patent No. 34093 in consideration of \$700 payable as follows: \$200 to be paid to Fairgrieve out of Craig's share of income from the business, and \$500 by the firm becoming responsible to the extent of \$1000 for the personal indebtedness of Fairgrieve to Messrs. Samuel, Benjamin & Co., for which amount the promissory notes of the said firm were in pursuance of the said agreement given to the said Samuel, Benjamin & Co."

Judgment.
MacMahon,
J.

By the Bills of Exchange Act, 53 Vic. ch. 33, sec. 30, ss. 4 (D.), "Every bill or note the consideration of which consists, in whole or in part, of the purchase money of a patent right, or of a partial interest, limited geographically or otherwise, in a patent right, shall have written or printed prominently and legibly across the face thereof, before the same is issued, the words 'given for a patent right': and without such words thereon such instrument * * shall be void, except in the hands of a holder in due course without notice of such consideration."

The words required by the section were not printed or written across the notes sued upon.

Not only was there the evidence of Craig that Mr. Benjamin made the suggestion that Craig should purchase an interest in the patent from Fairgrieve so as to enable the firm's notes to be given for the personal indebtedness of Fairgrieve to the plaintiffs, but it was admitted by counsel that such was the case. But it was urged that, notwithstanding such knowledge, the notes were valid, being given in payment of an indebtedness of Fairgrieve to the plaintiffs.

After the judgment of this Division in *Girvin v. Burke*, 19 O. R. 204, the then section of the Bills of Exchange Act was amended by adding thereto: "and without such words thereon" (given for a patent right), "such instrument shall be void, except in the hands of a holder in due course without notice of such consideration." So that if the argument of counsel for the plaintiffs were to prevail the Act might be contravened, and such bills or notes rendered

Judgment.

MacMahon,
J.

valid, if a creditor could shew a legal liability on the part of the debtor in payment of which the debtor had given the joint and several note of himself and a person to whom he had assigned a part interest in a patent. That is, A sells a horse to B for \$250. B sells a part interest in a patent right to C for \$125, and B induces C to join him in making a note payable to A for \$250 (\$125 of which represents the consideration for the assignment to C of the part interest in the patent), which note is issued to A with full knowledge that the consideration is partly for an interest in a patent, that note would, in the hands of A (according to the argument addressed to us on the plaintiffs' behalf) be a perfectly valid note, because of B's indebtedness to him arising out of the sale and purchase of the horse. The Act would be almost powerless to arrest the frauds perpetrated by means of patent rights if notes procured and issued in the way indicated should be held valid.

The Act is aimed at bills and notes where the consideration therefor is wholly or partially for an interest in a patent right. The notes sued upon are the joint and, several notes of Fairgrieve and Craig, and the consideration given to Craig to authorize Fairgrieve to sign the firm name thereto was the assignment to Craig of a part interest in the patent.

The endeavour in this case has been by indirect means to render legal that which it was the aim and very object of the statute to prevent. The cases demonstrating the futility of such attempts are collected in *Johnson v. Martin* 19 A. R. 592, at pp. 595, 597: that case being decided since the amendment above mentioned was made to the section.

The judgment against the defendant Fairgrieve was not moved against.

The appeal of the defendant Craig must be allowed and the judgment directed to be entered against him must be set aside with costs.

GALT, C. J. :—

Judgment.

Galt, C.J.

There can be no doubt from the evidence, that at the time when the notes in question were given by the defendant to Benjamin, he knew that the consideration, so far as Craig was concerned in consenting, that what may be termed "firm notes" was the transfer to him by Fairgrieve of a half interest in a patent right held by him.

By the provision of the Bills of Exchange Act, 53 Vic. ch. 33, sec. 30, sub-sec. 4 (D.), "Every bill or note the consideration of which consists, in whole or in part, of the purchase money of a patent right, or of a partial interest * * in a patent right, shall have written or printed prominently and legibly across the face thereof, before the same is issued, the words 'given for a patent right': and without such words thereon such instrument, and any renewal thereof, shall be void, except in the hands of a holder in due course without notice of such consideration." So far as Craig was concerned, the only consideration was such transfer, and of this Benjamin had full notice.

I concur in my brother's judgment.

ROSE, J., concurred.

G. F. H.

[QUEEN'S BENCH DIVISION.]

BRESSE ET AL. V. GRIFFITH ET AL.

*Partnership—Sale of Goods to—Dissolution of—Agreement to look to
Remaining Partner for Price—Evidence of.*

Where goods had been sold and delivered by the plaintiffs to a partnership consisting of the two defendants prior to the dissolution of the firm, the retiring partner set up in an action for the price of the goods that the plaintiffs had agreed to discharge him and look to the remaining partner alone. The only evidence of this was the fact that the plaintiffs had rendered an account for these goods, along with others for which the remaining partner alone was liable, to the remaining partner, and afterwards had accepted promissory notes for the amount, signed in the firm name, with the knowledge that the firm was then composed of the remaining partner only :—

Held, insufficient to shew an agreement such as was set up ; for the facts were quite consistent with an intention on the plaintiffs' part to look to both defendants in case the notes should not be paid at maturity.

Statement. AN action for the price of goods sold and delivered.

The plaintiffs, living in Quebec, had sold goods to the defendants, Henry and William Griffith, doing business at Hamilton, Ontario, under the name of William Griffith & Co. The firm was dissolved on 1st April, 1893. Goods to the amount of \$362.50 had been delivered prior to that date by the plaintiffs to the defendants which had not been paid for at the time of the dissolution. On 27th or 28th March other goods to a large amount were ordered from the plaintiffs by William Griffith in person, at Quebec, to be delivered at a later date.

In May, 1893, an account was sent by the plaintiffs' book-keeper, who swore that he was unaware of any dissolution, to William Griffith & Co., at Hamilton, along with three promissory notes for signature covering the amount of the account. These notes were signed by William Griffith in the firm name of William Griffith & Co., and returned by him to the plaintiffs. These notes were unpaid at maturity, and this action was brought against both partners, upon the account, as well for goods supplied and ordered before as after 1st April, 1893.

The action was tried before MACMAHON, J., without a Statement. jury, at Hamilton, on the 17th January, 1894.

Osler, Q. C., and N. McCrimmon, for the plaintiffs.

Moss, Q. C., and W. F. Walker, Q. C., for the defendant Henry Griffith.

S. F. Washington, for the defendant William Griffith.

January 29, 1894. MACMAHON, J.:—

At the conclusion of the trial I found that William Griffith, when he gave the order for the large bill of goods to Mr. Goulitte, the plaintiffs' salesman, on the 27th March, informed him that a dissolution of the firm of William Griffith & Co. had taken place, to take effect from the 1st April, and that in future the business was to be conducted by himself, and that the goods then ordered were to be charged to the new firm.

Mr. Osler, however, contended that for the goods shipped at dates subsequent to the dissolution, but on orders received from the firm of Griffith & Co. prior to the retirement of Henry Griffith, and amounting to \$362.50, the partners composing the old firm are still liable.

The goods shipped on the order given by William Griffith on the 27th March, and those subsequently shipped on orders given prior to the dissolution, were put in one account, and the notes of the new firm accepted on the 12th May, 1893.

Then has there been a substitution of debtors so as to release Henry Griffith, the partner who retired? Parsons on Partnership, 4th ed., p. 416, discussing the implied consent of creditors to a novation, says: "If the creditor has no security, and no paper evidence of his debt from the firm, and, after the partner retires, he accepts from the new firm, with knowledge of the retirement, the security or paper of the new firm,—this would seem to be not only an assent on his part, but an assent on consideration; for the acquiring either of additional security, or of paper which he may, by discount, at once convert into money, is con-

Judgment. sideration enough for the promise implied in his assent,
MacMahon, even though there is no new partner in addition to the
J. old in the new firm." See *Hart v. Alexander*, 2 M. & W.
484; *Lyth v. Ault*, 7 Ex. 669; and see the American note
to that case at p. 675.

It is a question for the jury whether there has been a novation: *Thompson v. Percival*, 5 B. & Ad. 925; *Harris v. Lindsay*, 4 Wash. C. C. 271. And I must hold in this case that the plaintiffs accepted, with full knowledge of the facts, the notes of the new firm.

The notes given on the 12th May, and discounted by the plaintiffs, were produced at the trial, but not put in.

There must be judgment for the plaintiffs as against the defendant William Griffith for \$1,962.80, with interest on the respective sums and from the dates mentioned in the seventh paragraph of the statement of claim, and with full costs. And there will be judgment for the defendant Henry Griffith dismissing the action as against him, but, under the circumstances, without costs.

The plaintiffs moved during the Hilary Sittings, 1894, against this judgment, upon the ground that the learned Judge should have found upon the evidence that the plaintiffs had no notice of the dissolution when they sold the goods, and should have held both defendants liable for the whole sum claimed; and, at all events, that so far as regarded the goods sold before 27th March, 1893, there was no evidence that the plaintiffs had agreed to accept William Griffith alone as their debtor; and that the learned Judge should have given judgment against Henry Griffith for the price of those goods.

The motion was argued on 15th February, 1894, before the Divisional Court (ARMOUR, C. J., and STREET, J.)

Clute, Q C., and N. McCrimmon, for the plaintiffs, cited *Harris v. Farwell*, 15 Beav. 31; *Bedford v. Deakin*, 2 B. & Ald. 210; *Swire v. Redman*, 1 Q. B. D. 536; *Scarf v. Jar-*

dine, 7 App. Cas. 345; *Birkett v. McGuire*, 31 C. P. 430; *Argument*. 7 A. R. 53; *Bottomley v. Nuttall*, 5 C. B. N. S. 122.

Moss, Q. C., for the defendant Henry Griffith, relied on the cases referred to by the trial Judge.

February 16, 1894. The judgment of the Court was delivered by

STREET, J. :—

We agree with the learned trial Judge in thinking that the plaintiffs must be taken to have had notice of the dissolution at the time the order was given by William Griffith on 27th or 28th March, 1893, and that the defendant Henry Griffith is not liable to pay for the goods then ordered.

With regard to the goods ordered before that time, the price of which was \$362, it is clear that both Henry and William Griffith were originally liable to pay for them, and that both must still be held liable unless it is shewn that the plaintiffs have agreed to discharge Henry and look to William alone. The only evidence of such an agreement is the fact that the plaintiffs rendered an account for these goods along with others for which William alone was liable, to William under his then name of William Griffith & Co., and afterwards, with the knowledge that that firm was composed of William only, received his notes under the firm name for the amount. We are of opinion that this is insufficient to shew an agreement on the part of the plaintiffs to discharge Henry and look to William alone. It is shewn that the account and notes were forwarded in the usual routine of business by the plaintiffs' bookkeeper, without any knowledge of the dissolution, to the usual address of the firm to whom all the goods had been charged. But, independent of this circumstance, the facts are quite consistent with an intention on the plaintiffs' part to do that which they have done, viz., to look to both defendants for the amount for which both were liable in

Judgment. case the notes should not be paid at maturity ; and, being
Street, J. quite consistent with that intention, we cannot hold them
to be evidence of a contrary intention. We have looked
through the cases cited to us and many others, and we
cannot find any case in which the bare circumstance that
the notes of a remaining partner have been taken, without
anything more, has been held sufficient evidence to dis-
charge the retiring partner from a debt for which he was
originally liable.

The judgment should therefore be amended so as to
order both defendants to pay this sum of \$362, with inter-
est and costs, including the costs of the motion to the
Divisional Court.

E. B. B.

[QUEEN'S BENCH DIVISION.]

RAY ET AL. V. ISBISTER ET AL.

Partnership—Promissory Notes—Action against Indorser—Action against Same Person as Maker—Res Judicata—Judgment against Firm—Action upon Judgment against Members—Conduct—Election—Estoppel.

The defendant was sued by the same plaintiffs in a former action as indorser of a promissory note, and judgment was entered in his favour upon the defence that he indorsed it for the accommodation of the plaintiffs without consideration. In this action he was sued upon the same note and others as a partner in the firm who were the makers of the notes, along with the other partner :—

Held, that the fact of his establishing his defence in the former action had no effect upon the question of his liability in this.

Nor were the plaintiffs debarred by the recovery of a judgment against the partnership from bringing an action upon the judgment against the individual members of it.

Clark v. Cullen, 9 Q. B. D. 355, followed.

The defendant set up that the plaintiffs had elected to treat the other member of the firm as their sole debtor, by reason of their having proved their claim with and purchased the assets of the partnership from the assignee thereof under an assignment for the benefit of creditors, in which it was recited that the other was the only person composing the firm ; and that the defendant had relied and acted upon their conduct and election, and they were therefore estopped from suing him as a partner :—

Held, that, even if there was evidence that the defendant had acted in any way by reason of the plaintiffs' action, no estoppel arose, because the plaintiffs did nothing shewing an election not to look to him, and he had no right to assume an election from what they did, nor to act as if such an election had been made.

THIS was an action brought by the firm of Ray, Street, & Co. against Malcolm Isbister and James Isbister. The plaintiffs claimed a declaration that the defendants were partners in the firm of M. Isbister & Co., and jointly and severally liable on a judgment recovered by the plaintiffs against that firm for \$4,986.13, and on several promissory notes and an overdrawn bank account, amounting in the aggregate (with the amount of the judgment) to \$27,488.13 ; and they claimed payment of that sum and interest.

The defendant James Isbister denied that he was a partner in the firm of M. Isbister & Co., or liable to the plaintiffs as such, and set up, besides, two special defences which are set out in the judgment.

Statement. The action was tried before STREET, J., without a jury, at Port Arthur, on 7th November, 1893.

Aylesworth, Q. C., and W. K. Cameron, for the plaintiffs.

Osler, Q. C., and R. G. Code, for the defendant James Isbister.

January 4, 1894. STREET, J. :—

Upon the evidence before me I must find that the defendant James Isbister held himself out to the plaintiffs as a partner in the firm of "M. Isbister & Co.," and that, whether actually a partner or not, he thereby made himself liable upon all the notes sued on, unless the defences which have been urged are an answer to the action.

The first of these arises from the verdict and judgment for James Isbister, the present defendant, in a former action brought by the same plaintiff against M. Isbister & Co., Adam Isbister & Bro., and James Isbister upon one of the notes sued on in the present action. In that action James Isbister was sued as indorser of the note in question, and in no other capacity. It was alleged that the note in question was made by M. Isbister & Co., payable to Adam Isbister & Bro., and indorsed by Adam Isbister & Bro. to the defendant James Isbister, who indorsed it to the plaintiffs. James Isbister pleaded that he had indorsed it upon an agreement or representation of the plaintiffs that he should not incur any liability by so doing, and that he did so without consideration and for the accommodation of the plaintiffs. Upon these pleadings a verdict was found in his favour, and judgment was entered thereon; judgment by default was entered against the other parties to the note, who were sued in their partnership names.

I am of opinion that the plaintiffs' right now to sue the defendant James Isbister as a partner along with Malcolm Isbister upon the note there in question, as well as upon other notes made by the firm of "M. Isbister & Co.," is not affected by the judgment above referred to. That judgment is quite consistent with James Isbister's being known

by the plaintiff to be and admitting himself to be a partner in the firm of "M. Isbister & Co.," and that he was simply contesting his separate personal liability as an indorser. It is as if he were being sued in two characters, and were disputing his liability in one of them; the fact of his establishing his defence in that character would have no effect upon the question of his liability in the other.

Judgment.
Street, J.

Nor is the plaintiff debarred by the recovery of his judgment against the partnership from bringing an action upon the judgment against the individual members of it. It was so held by the Court in *Clark v. Cullen*, 9 Q. B. D. 355.

The other defence relied on by the defendant James Isbister is that set up in the sixth paragraph of the amended statement of defence, and shortly stated is as follows: that Malcolm Isbister by an assignment for the benefit of his creditors, in which it is recited that he was the sole person composing the firm of M. Isbister & Co., assigned the assets of the firm to an assignee, and that the plaintiffs, with full knowledge of all the facts, proved their claim before the assignee, and purchased the assets of the estate from him, and so elected to treat Malcolm Isbister alone as their debtor; and that James Isbister, relying upon their conduct and election, refrained from purchasing the assets or endeavouring to obtain a larger price for them, and that the plaintiffs are therefore estopped from claiming against him as a partner.

There was no evidence whatever that James Isbister did, or refrained from doing, anything that he would not have done, or would have done, by reason of the plaintiffs having proved their claim against the estate in the hands of the assignee, or of their having purchased a portion of the assets from the assignee. And if James Isbister had acted in any way by reason of the plaintiffs' action, I am of opinion that still no estoppel would have arisen, because the plaintiffs did nothing shewing any election not to look to him; he had no right to assume an election from what

Judgment. they did, and had, therefore, no right to act as if such an election had been made.
Street, J.

I think that judgment must be entered for the plaintiffs for the amount of their claim with interest and full costs of the action.

E. B. B.

[QUEEN'S BENCH DIVISION.]

CRAM V. RYAN ET AL.

Negligence—Fire—Navigable Waters—Access to Shore and Navigation Rights—Public Rights—Private Rights—Faults on both Sides—Proximate Cause—Reasonable Precautions.

The plaintiff, owner of a scow, had, without authority, moored it permanently to the shore of a basin artificially created by the excavation of land adjacent to a navigable river, which formed the boundary at that point between Canada and the United States. The soil of the shore and basin had been patented to certain persons, the usual rights of access to the shore and of navigation being reserved. The defendants, licensees of the owners of the shore, with authority to take, and for the purpose of taking, sand from the shore by means of their own scow and a hired tug, of which the master was the owner, placed the tug and scow alongside the plaintiff's scow, by order of the foreman of the defendants' scow, to whose orders the master of the tug was bound to conform.

Owing to the negligence of the master, the plaintiff's scow caught fire from sparks emanating from the smoke-stack of the tug, and was destroyed:—
Held, that the plaintiff, although he had a right to use the waters of the basin for navigation and the shore for landing, was not entitled to use them in the way he was doing:—

Held, however, that the defendants, while entitled to similar rights, and, in addition, to use the shore for any other purpose which did not interfere with the rights of the public, were bound to omit no reasonable precautions to avoid injuring the plaintiff's property; and that they were liable for the negligence of the master of the tug.

Davies v. Mann, 10 M. & W. 546, applied and followed.

Statement. THIS action was tried at the Sault Ste. Marie Assizes, before STREET, J., without a jury, on November 20th and 21st, 1893. The facts are stated in the judgment.

M. McFadden and *C. F. Farwell*, for the plaintiff.
Lount, Q.C., and *W. H. Hearst*, for the defendants.

February 5th, 1894. STREET, J.:—

Judgment.

Street, J.

The plaintiff was a contractor, and owned a large scow, upon which was erected a building used as a boarding house by persons employed by him. On 6th June, 1893, and for several weeks before that date, this boarding scow, as it was called, was moored to the shore of the St. Mary's River, on the Canadian side. On the 6th June, 1893, the tug "Hattie Vinton," having in tow a scow belonging to the defendants, came up and was moored to the shore close alongside the plaintiff's scow, and began using her furnace and boiler for the purpose of supplying steam to work a sand pump on the defendants' scow. About half an hour afterwards the roof of the boarding scow was found to be on fire, and the whole building was soon destroyed, together with a quantity of stores on board.

This action was brought alleging that the fire was caused by sparks from the stack of the defendants' tug; that it was the result of the defendants' negligent management of the tug and the fire on board.

The defendants deny that the fire arose from the tug, deny the alleged negligence, deny their responsibility for the negligence, if any, of the master of the tug, and assert that the tug and scow were lawfully at the place in question, and that the plaintiff was a trespasser, and cannot, therefore, complain of their negligence.

Upon the evidence before me, I came to the conclusion that the fire was caused by sparks or burning soot from the smoke stack of the tug, and that the master of the tug was guilty of negligence in placing his tug and working his engine so close to the plaintiff's boarding scow, which was very dry and inflammable. I reserved for further consideration the other questions arising upon the defence.

The tug in question was not owned by the defendants; they had agreed with the owner and master at \$16 per day that he should draw their sand scow from the Sault Ste. Marie to the point at which they were in the habit of taking on board their sand, and back, and that he should

Judgment. furnish the steam which they required for working the
Street, J. sand pump on board the scow. The defendants furnished the fuel for the tug, and the master hired and paid his own men who were employed in working the tug. The defendants had a foreman on their sand scow, with several men under him. This foreman directed the master of the tug where to place the sand scow each day, when to supply the required steam, when to stop it, and when to take the scow away. It was also shewn that the master of the tug, without any new or special agreement, had used her, when directed by the defendants' foreman, to do other work than that in connection with the sand scow. Upon the day in question this foreman had ordered the master of the tug to lay her alongside the plaintiff's boarding scow, exactly as she was laid. The act which caused the fire was the laying of the tug and working her furnaces and boilers in dangerous proximity to the boarding scow, and, as this was done by the master of the tug in accordance with the express order of the defendants' foreman, I think the defendants are liable for the results which followed.

A further question arises upon the following facts: The plaintiff's boarding scow and the defendants' tug and sand scow were all moored to the shore at the time of the fire, and the shore at this point formed part of the south-east sub-division of section No. 24 of the township of Parke. That lot was patented on 11th October, 1878, to James Beatty, of Detroit, with the following reservations contained in the grant from the Crown: "Reserving free access to the shore of the lands hereby granted for all vessels, boats, and persons." "Reserving, nevertheless, unto us, our heirs and successors, the free uses, passage, and enjoyment of, in, over, and upon all navigable waters that shall or may hereafter be found on or under, or be flowing through or upon, any part of the said parcel or tract of land hereby granted as aforesaid." The land granted is described by metes and bounds, by the terms of which it extends to the shore of the St. Mary's river, and it was shewn that that river is a navigable river, and is traversed

by large vessels, and forms the boundary at that point between Canada and the United States.

Judgment.

Street, J.

The property was conveyed by the devisees of the patentee to Messrs. Moran and Fitzsimons, who, in May, 1892, gave the defendants a license to take from the land so granted whatever sand they might require for building the Canadian canal at the Sault Ste. Marie, for the sum of \$100 for each season. It was in pursuance of this license that the defendants were at the place in question when the fire happened. They had taken a large quantity of sand from the property during the season of 1892. The result of their having done so was to change the shore line very materially. It was originally a straight line; they had taken away so much sand as to have formed a deep bay or inlet which extended about 150 feet back from the original shore line, and which was wider than the approach to it. The mouth of the bay was about sixty feet wide; the bay itself was perhaps double that width, and was about 150 feet in length, as I have said. The sand had been pumped from the bottom as well as the sides of the bay until a depth sufficient to float the scows and tug had been obtained. The peculiar shape of the bay was due to the fact that the banks of the river and bay were composed in some places of clay, which was of no use to the defendants, and that they followed the deposits of sand, leaving the clay untouched. It will be understood from this description that the land under the waters of the bay was the property of Messrs. Moran and Fitzsimons, under whose authority the defendants were working. It was shewn that the plaintiff had no authority from any person to place his scow within the bay at all. The defendants' foreman had gone to the bay in question, a day or two before the fire, for the first time during the season of 1893, with the sand scow and tug for the purpose of taking sand, and, finding the plaintiff's boarding scow in the bay in a position which interfered with his operations, had ordered the people in charge of it to take it away. When he returned on the 6th June the position of the boarding

Judgment. scow had been somewhat changed, but it still occupied a
Street, J. part of the bay at which it was most convenient and desirable that the defendants' men should carry on their work, and it was on this account, and not with any intention or expectation of doing any injury to the plaintiff's boarding scow, that the defendants' tug was placed alongside it.

I think that, under these circumstances, the plaintiff was not entitled to use the bay and its shore and waters in the manner in which he was doing. Granting that he would have had a right to treat the waters of it as a part of the river and the shores of it as a part of the shore of the river, that is to say, to use the waters for the purposes of navigation and the shore as a landing place, it was not a proper user of either of them to occupy them as a permanent resting place for his boarding scow to the prejudice of other persons claiming under the owner of the shore. This portion of the case was by no means fully argued before me, and I have been referred to no authorities throwing any light upon it.

Upon the best consideration of the case that I have, under these circumstances, been able to give to it, I have come to the conclusion, as I have said, that the plaintiff was making an improper use of the bay; that he had no right to be there for the purposes for which he was there; on the other hand, that the defendants' scow and tug were lawfully there, carrying on a work which they were authorized to carry on there by the owner of the property. The shore was the property of the persons who had given to the defendants leave to carry on their operations there; and they were within their rights in using it for any purpose which did not interfere with the public rights of navigation and landing: *Dixon v. Snetsinger*, 23 C. P. 235; *Rose v. Groves*, 5 M. & G. 613; *Hart v. City of Albany*, 9 Wend. 571; *Anonymous*, Durham Assizes, 1 Camp. 517, note; *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662; Angell on Watercourses, 7th ed., sec. 541 a.

Such being the rights of the parties respectively at the point in question, and the property of the plaintiff having been destroyed, the question to be decided is whether the defendants, who had an undoubted right to proceed exactly as they did proceed, supposing the plaintiff's scow had not been there, have violated any legal duty by proceeding as they did proceed when they found the plaintiff's scow in possession of the shore and bay. I do not fail to remember that the position of the plaintiff's scow rendered it highly inconvenient, if not altogether impossible, for the defendants to obtain the sand for which they had come at any other point than that from which they proceeded to take it; nor that the plaintiff's workmen in charge of the scow had been warned by the defendants' foreman to remove it and had not done so. The defendants' workmen must either do their work alongside the plaintiff's scow or abandon it altogether. I think, under the circumstances, they were entitled to proceed with their work, but that they were at the same time bound to omit no reasonable precaution to avoid the chance of injuring the plaintiff's property. After much consideration, I am of opinion that they did not do all that they might have done for the plaintiff's protection, and that the fire has been the result of negligence on their part. According to the account given by the master of the tug, as soon as they were fast to the shore he cleaned the flues of his boiler by pushing the soot which had accumulated there into the back of the furnace. The draught of the furnace was first checked by taking off the flue-cap, and the plaintiff's servants on the boarding scow were warned to close their windows lest the soot should blow into them. When all the soot had been pushed into the back of the furnace the flue-cap was replaced and the engine was set working. A fresh breeze was blowing across the bow of the boarding scow, and there was naturally a strong draught through the furnace. I thought at the trial, and I still think, that the fire was carried from the furnace of the tug to the roof of the plaintiff's scow, and that it came, in all probability, in the

Judgment.

Street, J.

Judgment.

Street, J.

shape of burning soot, which would easily be carried by a strong draught from the back of the furnace through the smoke stack. I think the case is well within the principle of *Davies v. Mann*, 10 M. & W. 546, and that there should be judgment for the plaintiff, with a reference as to the amount of damages in accordance with the agreement of counsel at the trial. The parties may name a referee; otherwise, I will do so.

The plaintiff should have the costs to the trial inclusive. The costs of the reference will be reserved until after the report of the referee. If the defendants make an offer to pay a sum by way of damages which the plaintiff refuses, the costs of the reference will be allowed to him only in case he obtains a greater sum; and he should pay the costs of the reference if he does not succeed in doing so.

E. B. B.

[COMMON PLEAS DIVISION.]

REGINA EX REL. MOORE V. NAGLE.

Quo Warranto—*Information*—*High School Trustee*—*Civil Proceeding*—*Courts*—*Single Judge*—*Motion*—*Notice*.

A motion for an information in the nature of a *quo warranto* is the proper proceeding to take to inquire into the authority of a person to exercise the office of a High School trustee.

Askew v. Manning, 38 U. C. R. 345, 361, followed :—

Such a proceeding is a civil, not a criminal, one ; and is properly taken before a single Judge in Court, by way of motion, upon notice.

THIS proceeding was begun by a notice of motion served Statement.
by the relator upon the respondent, returnable before a Judge in Court at Osgoode Hall, for an order for leave to exhibit an information in the name of the Master of the Crown office, on behalf of Her Majesty, in the nature of a *quo warranto*, against Thomas L. Nagle, on the relation of John Moore, for the said Thomas L. Nagle to shew by what authority he claimed to exercise the office of a High School trustee for the High School district of Carleton Place.

The motion was argued before ROSE, J., in Court, on the 1st March, 1894.

W. R. Riddell, for the relator. The motion is properly made here, and a Judge sitting as the High Court has jurisdiction to entertain it. The motion is for an information in the nature of a *quo warranto*. The proceedings in the nature of a *quo warranto* under the Municipal Act are clearly inapplicable. The relator adopts the procedure sanctioned in *Regina ex rel. Clancy v. St. Jean*, 46 U. C. R. 77 ; *Regina ex rel. Clancy v. Conway*, *ib.* 85. This is a civil, not a criminal, proceeding : *Rex v. Francis*, 2 T. R. 484 ; *Rex v. Bennett*, 1 Str. 101 ; High on Extraordinary Legal Remedies, 2nd ed., sec. 591 ; Angell & Ames on Corporations, 10th ed., sec. 733 ; Tancred on *Quo Warranto*, p. 396 ; Cole on Criminal Informations, p. 113.

Argument. Being a civil proceeding, it is governed by the Judicature Act and the Consolidated Rules, and the application is therefore made to the High Court as now constituted. *Quo warranto* will lie in a case of this kind: *Askew v. Manning*, 38 U. C. R. 345; and is the only remedy: *Chaplin v. School Board of Woodstock*, 16 O. R. at p. 733; *McMurrich and Roberts' School Law of Ontario*, p. 229. It may be said that the proper procedure is by mandamus or action; but if the office is full *de facto*, *quo warranto* must be brought. If the office is vacant, and the plaintiff excluded, then there may be an injunction or mandamus: *Rex v. Oxford*, 6 A. & E. 349; *Cole*, p. 148; *Smith v. Petersville*, 28 Gr. 599; *Mearns v. Petrolia*, *ib.* 98.

Aylesworth, Q. C., for the respondent. This is not the kind of office as to which a proceeding of this kind will lie. High School trustees are not elected by the people, but appointed. The appointment of the respondent here was made by the town council, and the relator claims that he was previously appointed by the same body. The High School Act, 54 Vic. ch. 57, sec. 11, shews the manner of appointment. Under the Public Schools Act, 54 Vic. ch. 55, the trustees are elected by vote; provision is made by sec. 105 for inquiring into the validity of elections; and by sec. 32 the inspector has summary jurisdiction in rural school cases. But High School trustees are appointed by municipal councils just as clerks, assessors, etc., are appointed. Neither the statute 9 Anne, ch. 25 nor the common law applies to this kind of office. The statute is to be found in Shortt on Informations, etc., p. 114, and the cases are collected at p. 116. I refer especially to *Regina v. Backhouse*, 7 B. & S. 911. The writ of *quo warranto* was a writ at common law, and was a civil proceeding: Shortt, p. 110. The cases cited for the relator are cases of writs. But an information of *quo warranto* is different. It is a criminal proceeding—practically an indictment for usurping an office. If it is a criminal proceeding, the jurisdiction is in the Courts or Divisions representing the old Courts of Queen's Bench and Common

Pleas, and the motion should be before the Justices of the Queen's Bench or Common Pleas Division, in term, not in this Court, nor yet in a Divisional Court: *Regina v. Beemer*, 15 O. R. 266. In England the Act 47 & 48 Vic. ch. 61, sec. 15, provides that such proceedings as this shall be deemed civil proceedings, but there is no such provision here. *Regina ex rel. Stewart v. Standish*, 6 O. R. 408, was a case of a Public School trustee, and the relator came at once to the full Court. In the cases in 46 U. C. R. cited, the rules were granted by the full Court returnable before a single Judge. This is a sitting of the High Court. Your Lordship is the High Court, not a Division. The Master of the Crown office is not an officer of the High Court. There is no officer of the High Court in whose name the information can be exhibited.

Riddell, in reply, referred to *People v. Cook*, 4 Selden 67; *Commonwealth v. Browne*, 1 Sarg. & R. (Pa.) 382; *Republic v. Wray*, 3 Dallas 490; *Askew v. Manning*, 38 U. C. R. 345, per Harrison, C. J., at p. 357 *et seq.*

The motion was also argued on the merits.

March 12, 1894. ROSE, J. :—

The case of *Askew v. Manning*, 38 U. C. R. 345, is a clear authority for the motion: see p. 361.

The remaining question is whether the proceeding is civil or criminal in its nature. If the former, then the motion is well made in single Court. If the latter, then it must be made to the full Court: *Regina v. McAuley*, 14 O. R. 643; *Regina v. Beemer*, 15 O. R. 266.

The object of the proceeding is to try a civil right—a right to hold an office under a Provincial statute, and it is, in my opinion, in no sense a criminal proceeding. The form of procedure adopted does not determine the question, but the nature and object must be looked at.

It certainly, as it seems to me, cannot be said to be embraced within the term "criminal law" as found in the

Judgment.

Rose, J.

British North America Act, sec. 91, sub-sec. 27. I do not think it will serve any good purpose to discuss the question at length, as all that I could say may be found in the following authorities:—Comyns's Dig., vol. 7, p. 192 *et seq.*; Cole on Criminal Informations, p. 113; Angell & Ames on Corporations, 10th ed., sec. 733; High on Extraordinary Legal Remedies, 2nd ed., p. 458, sec. 591; Shortt on Informations, etc., pp. 108-111; Kerr's Blackstone, vol. 3, p. 263; *Askew v. Manning*, 38 U. C. R. at p. 356; *Regina v. Wason*, 17 A. R. 221; *Regina v. Hart*, 20 O. R. 611; *Regina v. Stone*, 23 O. R. 46.

It follows, if I am correct in the conclusion I have stated, that the motion was properly brought on before a single Judge: sec. 61 of the Ontario Judicature Act; and by way of motion upon notice: Con. Rules 525-6.

The information should be exhibited on the relation of John Moore as asked. I think there was sufficient ground shewn on the application for granting the motion.

The order will therefore go.

E. B. B.

[COMMON PLEAS DIVISION.]

CUTHBERT ET AL. V. NORTH AMERICAN LIFE ASSURANCE
COMPANY.

*Annuity—Apportionment—R. S. O. ch. 143, secs. 2, 5—Construction of
Contract—Annuity Bond—Policy of Assurance.*

In consideration of \$12,000 paid by plaintiffs' testator to the defendants, they, by an instrument in writing, agreed to pay him \$1,800 every year during his natural life, in equal quarterly payments of \$450 each. The terms "policy" and "annuity bond" were both used in the document itself as descriptive of its nature. The consideration was stated to be not only the \$12,000, but "the application for this policy and the statements and agreements therein contained, hereby made a part of this contract"; and it was provided that upon certain conditions "this policy shall be void":—

Held, in an action by his executors, that the instrument was not a policy of assurance within the exception in R. S. O. ch. 143, sec. 5, but an annuity bond; and that the money payable by the defendants under it was apportionable within sec. 2; and therefore the plaintiffs were entitled to recover a part of a quarterly instalment in proportion to the period between the last quarter day and the death of the testator.

THIS action was brought by the executors of the will of **Statement.**
James F. Mulligan to recover from the defendants \$390.60.

On 10th May, 1888, Mulligan and the defendants entered into an agreement whereby he was to purchase an annuity from them, and, in pursuance thereof he assigned to them a mortgage for \$12,000 and interest as a consideration for the annuity, and they executed and delivered to him a written instrument, the material parts of which were as follows:

"The North American Life Assurance Company, in consideration of the application for this policy, and the statements and agreements therein contained, hereby made a part of this contract, and of the assignment of a certain mortgage by the said applicant to the said North American Life Assurance Company, upon which there is alleged to be due the sum of \$12,000 and interest from the 15th day of December, A. D. 1888, at the rate of six per centum per annum, which mortgage is made by one Robert John Fleming to James F. Mulligan, the annuitant under this bond, of the town of Oshawa, in the county of Ontario, and

Statement. Province of Ontario, Canada, and (*sic*) promises to pay at its head office in the city of Toronto to James F. Mulligan, the said annuitant, an annuity of \$1,800 for every year during the natural life of the said annuitant, in equal quarterly payments of \$450 each, the first payment to be made on the 15th day of June, A. D. 1888.

It is understood and agreed that this annuity is granted upon the said application and the declaration therein contained that the said annuitant was aged seventy-four years at the last anniversary of his birth * * and that if the said declaration shall be found untrue, then this policy shall be void, and the said consideration shall be retained by the said company for their use.

It is expressly stipulated that this annuity bond is not assignable and that the said company shall be furnished at every payment hereon with satisfactory evidence of the existence of the life of the said annuitant. * * "

After the delivery of this instrument the defendants paid Mulligan his annuity regularly up to the 15th September, 1891.

Mulligan died on the 3rd December, 1891.

This action was brought on the 16th November, 1893, to recover a proportionate part of the quarterly instalment of \$450 which would have been due on the 15th December, 1891, if Mulligan had lived till then.

The facts above stated were set out in the pleadings, and the plaintiffs moved for judgment thereon.

The motion was argued before ROSE, J., in Court, on the 28th February, 1894.

D. D. Grierson, for the plaintiffs. The instrument in question is an annuity bond, not a policy of insurance, and therefore does not come within the exception in sec. 5 of R. S. O. ch. 143. The annuity accrues from day to day, and is apportionable under secs. 2, 3, and 4. I refer to R. S. C. ch. 124, sec. 4; Porter on Insurance, 2nd ed., p. 97; *Snarr v. Badenach*, 10 O. R. 131; *Booth v. Coulton*, 2 Giff. 514.

J. K. Kerr, Q.C., for the defendants. The amount in question is an annual sum made payable in a policy of assurance within sec. 5, which says "policies of assurance of any description." This is a policy, as is declared by the instrument itself. The application, which is part of the contract, is for a policy. It is an annuity under a contract in the nature of a policy. The instrument contains conditions for voiding it, and so has qualities kindred to those of the ordinary insurance policy. I refer to *Ausman v. Montgomery*, 5 C. P. 364; *Lowndes v. Earl of Stamford*, 18 Q. B. 425, 439; *Lewin on Apportionment*, ed. of 1869, pp. 138-154. It was in consequence of the decision in the *Lowndes* case that the provision found in sec. 1, sub-sec. 2, of R. S. O. ch. 143, was introduced in England. Argument.

March 12, 1894. ROSE, J.:—

There are two questions to be decided in the present action. The first is whether the document in question is a policy of assurance within the meaning of sec. 5 of ch. 143, R. S. O. 1887. The second is, if not, whether the money payable under it is an annuity within the meaning of sec. 2 of the same chapter.

As to the first question, I feel clear that the document is not a policy of insurance. The contract of insurance is defined in *Bliss on Life Insurance*, 2nd ed., ch. 1, sec. 3. After quoting definitions from Baron Parke and Tindal, C. J., the author selects, as in his opinion the best, that given by Bunyon, which is as follows: "The contract of life insurance may be further defined to be that in which one party agrees to pay a given sum, upon the happening of a particular event, contingent upon the duration of human life, in consideration of the immediate payment of a smaller sum, or certain equivalent periodical payments by another."

The bond in question is a contract by which, for and in consideration of the sum of \$12,000 paid by the late James F. Mulligan, the defendant company agreed to pay him an annuity of \$1,800 during his natural life, in equal

Judgment.

Rose, J.

quarterly payments of \$450 each, the first payment to be made on the 15th June, 1888. Upon his death the payments of course ceased. So that, instead of this being a contract in consideration of payments to be made to the company, by which upon his death the company was to pay a given sum, it was an agreement by which, in consideration of the payment of a lump sum, the company agreed to make certain payments, to cease upon his death. The essential element of a policy of life insurance, therefore, is lacking. It is strictly, and to my mind beyond question, an agreement to pay an annuity and nothing more. It therefore does not come within the provisions of sec. 5 of R. S. O. ch. 143—"Nothing in the preceding provisions of this Act contained shall render apportionable any annual sums made payable in policies of assurance of any description."

The second question raised by the defendant company was upon the authority of *Lowndes v. Earl of Stamford*, 18 Q. B. 425. This was a decision under the 4 & 5 Wm. IV. ch. 22, the provisions of which, as it seems to me, are entirely different from those of ch. 143. In that case it was held that the statute did not apply where the payments were not continuing, but ceased with the determination of the interest of the person receiving the apportionment. Lord Campbell, in delivering the judgment of the Court, observed (p. 439): "The time fixed by the statute, when the apportionment is made recoverable, is 'when the entire portion of which such apportioned parts shall form part shall become due and payable.' This contemplates a case where the party who has to pay will have to pay for the whole period to some one, and not a case where the payment entirely ceases with the determination of the interest of the person receiving the apportionment, and where the entire portion, of which this forms a part never does become due or payable."

Even under that statute, there was a difference of opinion, as shewn in the judgment of Vice-Chancellor Kindersley in *Trimmer v. Danby*, 23 L. J. Ch. 979. The section of the

statute of 4 & 5 Wm. IV. may be found in effect in *Lowndes v. Earl of Stamford*, at p. 430. As I have said, the provisions of our statute are entirely different.

Judgment.
Rose, J.

By section 2 it is provided that "All rents, *annuities*, dividends, and other periodical payments in the nature of income * * shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly." The document in question provides for the payment of an annuity and comes literally within the provisions of that section.

Section 3 has language similar to that relied upon by Lord Campbell, C.J., where there are these words: "The apportioned part of such rent, annuity, dividend, or other payment, shall be payable or recoverable in the case of a continuing rent, annuity, or other such payment when the entire portion, of which such apportioned part forms part, becomes due and payable, and not before." But it also contains the following provision: "And in the case of a rent, annuity, or other such payment *determined* by re-entry, *death*, or otherwise, when the next entire portion of the same would have been payable if the same had not so determined, and not before." These words seem to me to be literally applicable to the case in question, where the payments under the bond ceased upon the death of the annuitant.

Section 4 makes the matter still clearer. It provides that "All persons and their respective heirs, executors, administrators and assigns, and also the executors, administrators and assigns, respectively, of persons whose interests determine with their own deaths, shall have such or the same remedies for recovering such apportioned parts as aforesaid, when payable (allowing proportionate parts of all just allowances) as they respectively would have had for recovering such entire portions as aforesaid, if entitled thereto respectively."

The provisions of sub-sec. 2 of sec. 4 do not apply to a case like the present, and need no further observation.

The case of *Ausman v. Montgomery*, 5 C. P. 364, was a decision under the English statute which was assumed

Judgment. to be in force in Upper Canada. But our statute was not
Rose, J. introduced until 37 Vic. The English statutes were 4 & 5 Will. IV. ch. 22, and subsequently 33 & 34 Vic. ch. 35.

It was said in argument that the definition of annuities in the interpretation clause of ch. 143, namely, "‘Annuities’ shall include salaries and pensions," was introduced in England in consequence of the decision in *Lowndes v. Earl of Stamford*, 18 Q. B. 425, but that fact does not seem to me in anywise to cut down what appear to be the express provisions of our statute.

I therefore am of the opinion, as expressed, that the document in question is an annuity bond and not a policy of insurance, and does not come within the exception contained in sec. 5, and further, that it is within the provisions of sec. 2, and therefore that the quarterly payment which would have fallen due on the 15th December, 1891, must be considered as having accrued from day to day, and apportionable in respect of the time during which the annuitant lived. It follows that the plaintiffs are entitled to recover the proportionate part from the time since the last payment under the bond, namely, the 15th day of December, 1891.

There must be judgment for the plaintiff for the sum of \$390.60 and interest thereon since the date of the issuing of the writ, the 16th day of November, 1893, and costs of the action.

The English cases to which I have referred may be conveniently referred to in Lewin on Apportionment, pp. 154-5.

The cases prior to the decision in *Ausman v. Montgomery*, 5 C. P. 364, are collected in the judgment in that case.

E. B. B.

[COMMON PLEAS DIVISION.]

NEILSON V. TRUSTS CORPORATION OF ONTARIO.

Life Insurance—Benefit Certificate—Change of Direction as to Payment—Trust—Revocation—Will—Executors—R. S. O. ch. 136—51 Vic. ch. 22 (O.)—53 Vic. ch. 39 (O.).

In October, 1886, an endowment certificate upon the life of a widower with one child was issued to him by a benefit society, the sum secured thereby being designated by a clause therein as payable to the child. In February, 1888, the insured, having married again, indorsed on the certificate a writing revoking the original designation and directing payment to his wife. In November, 1890, his wife having died, he indorsed on the certificate a direction that payment should be made to his executors, administrators, and assigns. He died in March, 1893, a widower, leaving two children, the one first mentioned, and one born in May, 1888. By his will, dated in July, 1888, he left all his estate to his children in equal shares :—

Held, that under the powers conferred by R. S. O. ch. 136, even as amended by 51 Vic. ch. 22, the insured had only a limited authority to vary the terms of the certificate; and he could not revoke the direction for payment to his daughter and make a direction for payment to his wife.

Mingaud v. Packer, 21 O. R. 267; 19 A. R. 290, followed.

By virtue of 53 Vic. ch. 39, sec. 6, he might, when he made the indorsement of November, 1890, have transferred or limited the benefits of the certificate in any manner or proportion he saw fit between his children; but he could not destroy the trust created by the certificate and declare a new trust which might, by making the fund applicable to the payment of debts, deprive his children of all benefit in it, and so render the Act nugatory.

SPECIAL case stated for the opinion of the Court.

Statement.

Thomas H. Dumble was a member of the Canadian Order of Foresters. On the 1st October, 1886, he being then a widower with one child only, Madeline R. Dumble, an endowment certificate was issued to him by the Order for the sum of \$1,000, which sum was payable to "the person or persons whose name or names are hereafter written, within thirty days after satisfactory proof of the death of the said brother" (Thomas H. Dumble).

The certificate was subject to the constitution and such by-laws as were then in force, and to such amendments or additions as might thereafter be adopted.

The certificate contained the following clause: "This certificate is designated as payable to my daughter, Made-

Statement. line R. Dumble, and must be presented at the time of application for payment."

On the 25th February, 1888, Thomas H. Dumble, having married a second wife, made on the certificate the indorsement following :

"I, T. H. Dumble, to whom the within certificate was issued, do hereby revoke my former direction as to the payment of the endowment due at my death, and now authorize and direct such payment to be made to Grace Mary Dumble, my wife."

This indorsement of the change of disposition of the endowment was under Dumble's hand and seal, and was assented to on the 28th February, 1888, by the Order of Foresters, by an indorsement on the back of the certificate.

On the 17th November, 1890, Dumble, under his hand and seal, made the following indorsement on the certificate :

"I direct payment of above to be made to my executors, administrators, and assigns, my said wife being deceased."

Dumble died on the 10th March, 1893, a widower, having made his last will and testament, dated the 24th July, 1888, a copy of which was annexed to and formed part of the special case.

At his death, Dumble left him surviving two children, Madeline Roswell Dumble, of whom the plaintiff was the duly appointed guardian, and Grace Boyer Dumble, born 22nd May, 1888, of whom the defendants were the guardians.

The surviving executor of Dumble's will having renounced probate, the defendants were duly appointed administrators, with the will annexed, of his estate.

By the will the testator devised and bequeathed his real and personal estate to his children, share and share alike.

The question submitted for the opinion of the Court was: How should the said sum of \$1,000 be distributed by the defendants under the endowment certificate and the indorsements thereon ?

The case was argued before MACMAHON, J., in Court, on Argument. the 27th February, 1894.

Northrup, for the plaintiff. The question is whether the intentions of the deceased were carried out by the indorsements which he made upon the certificate. I submit that the attempted revocation of the designation in favour of Madeline, by the indorsement of 25th February, 1888, was inoperative. Under R. S. O. ch. 136, secs. 5 and 6, which sections have been held to govern the power which the insured has over the policy, he had no power to make such a revocation; all he could do was to vary the apportionment. The beneficiary under the certificate took a vested interest which could not be divested. This very point was decided in *Mingeaud v. Packer*, 21 O. R. 267, affirmed by division of the Court of Appeal, 19 A. R. 290. At the time of the second indorsement, 17th November, 1890, the powers of the insured were still governed by R. S. O. ch. 136. That indorsement could not avail to divert the fund to the estate of the insured, for the policy of the Act and of all the amendments is to preserve it for the wife and children. I refer to *Re Cameron*, 21 O. R. 634. Amendments to the revised statute have given new powers, but at all events there is no power to give the fund to the executors. The original designation being in favour of Madeline, nothing has been done to deprive her of her rights.

Hoyles, Q. C., for the defendants. By the terms of the certificate, a change may be made in the names of the beneficiaries. The deceased had power to make an alteration by his will. The fund, if ordered to be paid to the executors, will not go to them as part of the estate for payment of debts, but they will take it as a trust for both children. There is power to make an apportionment by will: *Re Lynn*, 20 O. R. 475; *Beam v. Beam*, 24 O. R. 189; *McKibbon v. Feegan*, 21 A. R. 88. I rely on 51 Vic. ch. 22 (O.), as authorizing what was done.

N. F. Davidson, on the same side. The Act 55 Vic. ch. 39, sec. 37 (O.), passed after the decision of the Queen's

Argument. Bench Division in *Mingeaud v. Packer*, 21 O. R. 267, shews the purview of the whole legislation.

Northrup, in reply. The Act 51 Vic. ch. 22 (O.) is merely declaratory of the intention of the legislature in the Act, as it is in the revised statutes: *Swift v. Provincial Provident Institution*, 17 A. R. 66, per Hagarty, C. J. O., at p. 69. It is ingenious to say that the indorsement in favour of the executors, was to them for the benefit of the children, but the indorsement did not say so. If it had, I should have to give up my point.

March 2, 1894. MACMAHON, J.—(after stating the facts as above):—

When Thomas H. Dumble undertook, on the 25th February, 1888, to revoke the direction as to payment contained in the certificate, and directed payment of the amount mentioned therein to his wife Grace M. Dumble, the Act 51 Vic. ch. 22 (O.), making R. S. O. ch. 136, an Act to secure to wives and children the benefits of life insurance, apply to provident and benefit societies, had not been passed—it not having been assented to until the 23rd March, 1888. But, even under the powers conferred by the amending Act, the insured has only a limited authority to vary the policy, or declaration, or apportionment.

There was no power in the present case to revoke the direction in the policy for payment to his daughter Madeline, and make a direction for payment to his then wife: see *Mingeaud v. Packer*, 21 O. R. 267, and 19 A. R. 290.

By virtue of 53 Vic. ch. 39, sec. 6 (O.), (amending subsec. 1 of sec. 6 of R. S. O. ch. 36), he might, when he made the indorsement of the 17th November, 1890, on the certificate, have transferred or limited the benefits of the policy in any manner or proportion he might have deemed advisable between his children. But the insured, while he might vary, could not destroy, the trust created by the

policy, and declare a new trust which would or might deprive his children (his wife being dead) of all benefit in the trust. To do that would be to render the Act for securing to wives and children the benefits of life insurance nugatory.

Judgment.
MacMahon,
J.

The indorsement of the 17th November, 1890, was in favour of the executors, administrators, and assigns of the deceased, so that it would form part of the estate to be administered by them. And, although by the will the testator's real and personal estate is devised and bequeathed to his children, share and share alike, it is possible the administrators might not after payment of the testator's debts have anything to divide.

There must be judgment declaring that the said sum of \$1,000 under the certificate must be applied for the sole benefit of Madeline Roswell Dumble.

E. B. B.

[CHANCERY DIVISION.]

IN THE MATTER OF ROBERT H. HUNTER'S LICENSE.

Intoxicating Liquors — Shop License — Application for—Certificate of Electors—Liquor License Act—56 Vic., ch. 53, sec. 1 (O.).

On an application for a shop license under sub-section 14, of section 11, of The Liquor License Act, 56 Vic., ch. 53, sec. 1 (O.), it is imperative that the petition which is to be filed with the inspector before 1st April, be accompanied by a properly signed certificate of the majority of the electors, and the Act does not authorize the granting of such a license contrary to the provisions of that section.

Semble, it is otherwise as to a tavern license, in which case a discretion rests with the commissioners.

Decision of MEREDITH, J., *ante* p. 153, reversed.

Statement. THIS was an appeal to the Divisional Court from the judgment of Meredith, J., reported *ante* p. 153, granting prohibition restraining the Judge of the County Court of the county of York from making an order revoking a shop license granted to one Robert H. Hunter.

The appeal was argued on December 18, 1893, before BOYD, C. and FERGUSON, J.

Maclaren, Q.C., for the appeal. The license was granted improperly. The County Judge has full jurisdiction, power and discretion : R. S. O. c. 194, secs. 91 and 92. Section 1, 53 Vic. c. 56 (O.), shews what kind of a certificate must accompany a petition for a license, and section 31 R. S. O. c. 194 fixes the time when it must be in as April 1st. Here the insufficient certificate was in before that date, but the supplemental list was not in until April 15, much too late. No prohibition should be granted prohibiting the County Judge. He is to "determine and adjudge": sec. 91, and his adjudication "shall be final and conclusive": section 92.

E. F. B. Johnston, Q.C., was called on as to the question of prohibition. The question is, is the *mens rea* incorporated into the Act? The offence was the issue of the license contrary to the provisions of the Act. It was the act of the commissioners. The applicant might have been, and in fact

was, no party to it. If so, surely he should not be punished. Argument.
Sections 11 and 31 shew the requisites, and time is not made an essential. The matter was discussed by the parties interested before the commissioners, and the proper remedy was prohibition to them. Section 91 leaves the County Judge no discretion. He must revoke the license if it was issued contrary to the statute. He cannot decide contrary to the law to give himself jurisdiction. If his opinion is wrong, then he had no authority and prohibition will lie. This is a penal section, and the *mens rea* is necessary. The principle laid down in Maxwell on the Interpretation of Statutes, 2nd ed., 403, must be applied to it. Under section 67 the penalty provided is merely a money fine for a deliberate wrongful act. In this case an innocent man would be punished by the loss of his business for two years: *The Aberdare Local Board of Health v. Hammett*, L. R. 10 Q. B. 162; *Dickenson v. Fletcher*, L. R. 9 C. P. at p. 7; *The Queen v. Tolson*, 23 Q. B. D. at p. 177. The nature of the penalty may be considered: *Re Elston v. Rose*, L. R. 4 Q. B. 4; *Ex p. M'Fee*, 9 Ex. 261; *Godson v. The Corporation of the City of Toronto*, 18 S. C. R. 36; *The Queen v. Local Government Board*, 10 Q. B. D. at p. 321. Under 53 Vic. c. 56, sec. 1, the application "must be accompanied by a certificate" of the electors. That is a mere matter of procedure. The chief object of the Act is that a license shall not be granted except at the request of a majority of the ratepayers. When should the application be accompanied by the petition of the ratepayers? When the application first goes in, or later when it comes before the board? The section refers to the time when the subject matter is before the board. The time is not made obligatory, and unless the license is issued contrary to the statute the County Judge has no jurisdiction, and if his judgment is bad in law, prohibition should issue. Section 11, sub-section 2 read in connection with sub-section 21 shews that in case of a tavern license, the action of the board in granting a license, although contrary to the provisions of the Act, is not invalidated and the license

Argument. would be good. By parity of reasoning, this it is submitted, applies with equal force to shop licenses, otherwise the innocent licensee is punished for irregularity on the part of the commissioners. I also refer to *Thompson v. Harvey*, 4 H. & N. 254; *Rex. v. Loxdale*, 1 Burr. at p. 447; *The Queen v. Ingall*, 2 Q. B. D. 199; *The King v. The Justices of the Borough of Leicester*, 7 B. & C. 6. *Maclaren*, Q.C., in reply.

February 15, 1894. BOYD, C.:—

Hunter applied for a new shop license before the 1st April, 1893, accompanied by a petition insufficiently signed; this was amended by supplementary petition filed on 15th April, upon which the license was granted by the commissioners. The County Attorney applied to the County Judge to revoke this license, but his action was intercepted by an order for prohibition granted by my brother Meredith, which is now in appeal before this Divisional Court.

Section 91 of the Liquor License Act, R. S. O. c. 194, provides that upon complaint, etc., that a license has been issued contrary to any of the provisions of the Act * * the Judge of the County Court * * may determine and adjudge that such license ought to be revoked. Does this license appear to be issued contrary to the Act?

Section 31 of the Act provides that a shop license shall not be granted to any person unless he has filed his application with the inspector on or before the 1st April of that year. By amendment to sub-section 14 of section 11 of the Liquor License Act, it is provided that the petition for a license must be accompanied by a certificate signed by a majority of the electors, etc.: 53 Vic. c. 56, sec. 1.

Sub-section 21 of the said section 11 reads thus, "The foregoing sub-sections of this section are declared to be obligatory on the board and inspector, but non-compliance therewith shall not invalidate the action of the board or inspector. Nothing in this sub-section contained shall

authorize the granting of a license contrary to the provisions of sub-section 14."

Judgment.

Boyd, C.

Sub-section 2 of section 11 provides that a petition for a tavern license shall be filed with the inspector on or before the first of April. Being included in section 14, this would appear to enable the board to disregard non-compliance therewith, so that a tavern license granted upon a petition filed after the 1st of April might be valid. But I cannot read the clauses of the Act as extending the like latitude to cases of *shop* license for which the time limit is fixed by another section, *i. e.*, section 31.

The filing of this petition must be accompanied by a properly signed certificate, and the Act does not authorize the granting of a license contrary to the provisions of sub-section 14 of section 11, which is the enactment that the certificate of electors must accompany the petition. The legislature has chosen to make a distinction between shop licenses and tavern licenses, and it is not for the court to extend the directory character of the time-limit applicable to the tavern license beyond its own limits.

The wholesome construction of modern statutes is to give due effect to the words used, and not to add to or detract from the language from reasons extraneous to the Act, provided always if there is ambiguity such a construction is to be adopted as avoids absurd or mischievous results.

Bowen, L. J., says in reference to time in a statute: "You must look at each Act of Parliament and at each section to see exactly what it means. No other rule of construction of Acts of Parliament that I know of is of much use, except to try and find out as best you can what the Act of Parliament means, and that is not a rule of construction at all": *The Queen v. The Justices of the County of London*, [1893] 2 Q. B. at p. 491. And in *The Queen v. The Judge of City of London Court*, [1892] 1 Q. B. 273, the Judges say: "If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity": Lord Esher, M. R., at p. 290, and Lopes, L. J., at p. 301.

Judgment.

Boyd, C.

In this statute, I think the words are clear and have one meaning, and that no absurd results follow from attributing to them the meaning that this shop license was issued contrary to the provisions of the Act. It may be thought that the penalties attaching to this aberration from the requirements of the Act are unduly severe, as no moral or intentional wrong-doing was in contemplation ; but that (if it be so) is a matter for the legislature to modify and not for the Judges so seek to countervail by a strained reading of the other parts of the Act.

For these reasons I cannot agree with the decision in appeal, and I think it should be reversed and the matter, which is to my mind manifestly within the jurisdiction of the County Judge, be left for him to deal with. It is not a case for costs.

FERGUSON, J.:—

I agree with the judgment of the Chancellor just read. The learned Judge has, so far as I can perceive, referred to and shewn the application of each of the sections and sub-sections of the Act that bear upon the case, and to do this again would be only a repetition, or at most another production of the same things and the same result in different language, and I do not see that it can be considered needful to do this.

There is, however, a further reason, as it appears to me, supporting the conclusion arrived at, which seems not to be expressed or not clearly and fully expressed in the judgment.

The 91st section of the Act is expressed in unmistakable language. It is not contended that there is, and I am entirely satisfied that there is not, any ambiguity or room for divergent opinions as to the meaning of the words of this section or the words in which any part of the section is expressed.

It is, I think, beyond question, that the section gives jurisdiction to the Judge of the County Court in matters

of this kind, when brought before him in the manner provided for by this section and section 92, which latter section provides that the complaint may be by a short petition to the Judge, entitled, "In the County Court of the county of ———, and in the matter of the license granted," etc., etc. Judgment.
Ferguson, J.

It is not disputed that this matter was properly brought before the County Court Judge according to the provisions of the Act, and the provisions of section 92, indicate (to me) most plainly, that the "complaint" when so brought before the Judge is, and is to be considered, to be a matter pending in the Court (if this last would make any difference), and the Judge is given, by these sections, an ample jurisdiction, section 92, providing that he may dismiss the matter of the complaint, or make such order as he deems just, with or without costs, to be paid by the prosecutor or defendant, and that the order on adjudication of the Judge shall be final and conclusive, and shall not be the subject of appeal or revision by any Court whatever, section 91 having given him, specifically, the power to determine and adjudge that the license upon any of the causes "aforesaid" ought to be revoked.

The order, upon the adjudication of the Judge of the County Court, has, as I understand, not been issued, the same having been intercepted and delayed by reason of the application for the prohibition.

The matter pending in the County Court before the Judge is a matter, in and over which, I cannot but think that Judge has full and ample jurisdiction. I do not see that the learned Judge of the County Court was in error at all.

It is certainly not a case in which by an error in the construction of a statute, or otherwise, he gave himself jurisdiction he did not possess.

I think the learned Judge, from whose order this appeal is, fell into an error when he sought to ascertain in this case the real intention of the legislature otherwise than by ascertaining the meaning of the language that the legislature employed.

Judgment. When the words employed admit of but one meaning, a Court is not at liberty to speculate on the intention of the legislature, or to construe an Act according to its own notions of what ought to have been enacted. The questions for the interpreter (the Court) is not what the legislature meant, but what its language means: Maxwell's Interpretation of Statutes, 2nd ed., pp. 6 & 7—that is where the enactment is complete and unambiguous—as I think it is in the present case.

Ferguson, J.

The appeal should, I think, be allowed.

G. A. B.

[CHANCERY DIVISION.]

SOUTHWICK V. HARE ET AL.

Damages—Measure of—Trespass to the Person—Arrest before Indorsement of Warrant—Detention After.

A warrant for the arrest of the plaintiff, who had made default in paying a fine on conviction for an infraction of the liquor license law, was sent from an outlying county to a city. Before it was endorsed by a magistrate in the city the plaintiff was arrested there by two of the defendants, the chief constable and a detective, and confined. Some hours after the arrest the warrant was properly endorsed and the detention of the plaintiff was continued until payment of the fine :—

Held, that the only damages recoverable by the plaintiff was for the trespass, up to the time of the backing of the warrant :—

Held, also, that the plaintiff being illegally in custody under a criminal charge, his subsequent detention on a similar charge, under a proper warrant was lawful.

Distinction between subsequent civil and criminal proceedings in such cases pointed out.

Statement.

THIS was an action brought by George Southwick against George W. Hare and others for trespass.

The plaintiff had been fined for selling liquor contrary to law in the county of Oxford, and had gone to reside in Toronto. The fine not having been paid, and no sufficient distress being found, a warrant for his arrest was issued in the county of Oxford, and forwarded to Toronto to be acted upon. The plaintiff was arrested about ten o'clock

in the morning and confined in the police cells, before the warrant was endorsed by a magistrate in Toronto. The defendant Cuddy (a detective) made the arrest, and the defendant Grasett (chief constable) was aware that the warrant was not endorsed. The defendant Pow, a constable from the county of Oxford, arrived during the evening of the day on which the arrest was made, and on his proving the signature of the magistrate issuing the warrant, it was endorsed by a magistrate in Toronto about nine o'clock that evening. He then took charge of the plaintiff and conveyed him to Woodstock, where, after being confined in the jail, he paid the fine amounting to \$66.65 and obtained his liberty. Statement.

The action was tried at the Autumn Assizes held in Woodstock, on October 31st, 1893, before MACMAHON, J., and a jury.

Nesbitt, Q. C., for the plaintiff.

H. M. Mowat, for the defendants, Grasett and Cuddy.

J. B. Jackson, for the defendant, Pow.

The trial Judge charged the jury that the only damage they should take into consideration, was for the period between the time of the arrest in the morning and the time of the endorsement of the warrant in the evening, and that the subsequent detention was legal.

The jury brought in a verdict for the defendant Pow, and against the defendants, Grasett and Cuddy, for \$50, and the Judge directed judgment for the \$50, "with such costs as the plaintiff may be entitled to under the statute and practice, with the right of the said defendants, Grasett and Cuddy, to set off against such judgment and costs, the excess of Superior Court costs over the costs to be taxed to the plaintiff."

The plaintiff moved to increase this verdict or for a new trial before the Divisional Court, and the motion was heard on December 20th, 1893, before BOYD, C., and FERGUSON, J.

Argument.

DuVernet, for the motion. The action is for trespass. The original arrest was entirely without authority. No legal arrest could be made until the warrant was endorsed. Even a proper endorsement only authorizes the apprehension, but here the apprehension had been already made. When the warrant was subsequently endorsed, the plaintiff should have been liberated before he could be legally apprehended or arrested. That not having been done, and the original arrest being illegal, the whole detention was illegal. The evidence shews the effect of the arrest was serious illness; the plaintiff should get substantial damages for that and for the way he was treated, and part of that certainly should be the amount (the fine) he had to pay under stress of the arrest to obtain his liberty, which is the very smallest amount his verdict should be increased by. I refer to *Re Alfred Egginton*, 2 E. & B. 717; *Jones v. Grace*, 17 O. R. 681; *Hoover v. Craig*, 12 A. R. 72; *McGregor v. Scarlett*, 7 P. R. 20; *Friel v. Ferguson*, 15 C. P. 584; *Clark v. Woods*, 2 Ex. 395.

H. M. Mowat, contra. The defendants, Grasett and Cuddy, were set in motion by the warrant from the county of Oxford. They presumed that the fact of the existence of the warrant was sufficient authority for them pending the endorsement. The evidence shews they were not actuated by malice. Even if there was liability for the original arrest, it ceased immediately on the endorsement of the warrant and the taking of the prisoner out of their hands.

February 15th, 1894. BOYD, C.:—

It has been already held in this case (15 P. R. 222), that there was power to back the warrant so as to have it run in another county. That being so, I agree with the ruling of the trial Judge, that the defendants who arrested without warrant are liable in trespass down to the time when the warrant was endorsed and the measure of damages was rightly limited to what occurred and during that period.

The cases cited as to arrest, under civil process are not applicable to a case of liquor conviction, which is in the nature of a crime.

Judgment.
Boyd, C.

The custody at Toronto was illegal till the warrant was endorsed, but the officer from Oxford procured the signature of the magistrate to the backing on the warrant, and then took the prisoner away to Woodstock, by virtue of this endorsed warrant.

This act of endorsement changed the nature of the custody from unlawful to lawful, and the transaction became severable: *The Queen against Richards*, 5 Q. B. at p. 932; *Re Alfred Egginton*, 2 E. & B. 717; *Hutchinson v. Lowndes*, 4 B. & Ad. 118; *Egginton v. The Mayor, etc., of Lichfield*, 5 E. & B. at p. 108.

The action was essentially one of trespass, tried with a jury, and under Rule 1170 the Judge had power to deal with the costs as he did.

Motion discharged and judgment affirmed with costs.

FERGUSON, J. :—

The action which is for trespass to the person, was tried at Woodstock. The motion is for a new trial, and is made by the plaintiff, he not being satisfied with the verdict in his favour against the defendants, Grasett and Cuddy.

The verdict is against these two defendants, upon the ground that they were parties to the arrest in Toronto of the plaintiff and his being detained a few hours in custody before the warrant was endorsed in Toronto, it having been issued in the county of Oxford.

The finding was pursuant to the charge of the learned Judge, that the jury should confine the damage to what they might deem proper to award for the arrest and detention or confinement for the few hours before the warrant was properly endorsed and acted upon, so endorsed.

The plaintiff's contention is, that the charge of the learned Judge was erroneous; that the jury should have been directed to find and award damages in respect not only of the arrest

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Ferguson, J.

and detention for the few hours, but also in respect of his, the plaintiff's, having been brought in custody under the warrant from Toronto to Woodstock, in the county of Oxford, and in respect as well of some alleged confinement there, and certain moneys that he professes to say that he paid under duress.

It is not disputed that there was a good and proper conviction of the plaintiff in the county of Oxford, or that a warrant was properly issued upon that conviction.

There appears to have been some discussion at the trial respecting the endorsement of the warrant in Toronto. The papers are not produced in Court here. I have taken occasion, in addition to perusing the notes of the evidence, to enquire of the learned trial Judge respecting what took place at the trial as to the warrant, and he informs me that it was produced by the jailer or officer in whose custody it was; but that he desiring to keep it for his own protection, it was agreed that a copy should be put in instead of it, which, however, now appears not to have been done.

In all the circumstances, and with what light there is, I think it must be assumed that there was a proper conviction in the county of Oxford, a proper warrant and a proper endorsement of that warrant in Toronto.

The defendants, Grasett and Cuddy, arrested or caused the arrest and detention for a few hours, of the plaintiff under the warrant from Oxford before it was endorsed in Toronto.

A contention for the plaintiff was, that the plaintiff being illegally in custody upon a criminal charge, there could be no legal or proper arrest or detention or confinement of him upon that criminal charge, until he was first set free from the illegal custody and at liberty, when he might be arrested, but not before; and that for this reason, these two defendants are liable in damages for all that occurred to the plaintiff from the time of his arrest by them, or at their instance, until his liberation at Woodstock, he having been taken into custody

upon what I have said must be now taken to be a proper warrant, properly endorsed, before being liberated from the illegal custody. Judgment.
Ferguson, J.

On this subject many cases and authorities were referred to and relied on. These I have taken occasion to peruse and examine. So far as I am able to perceive, they only shew that a person in illegal custody upon a criminal charge, or supposed criminal charge, cannot, before being liberated therefrom, be legally and properly taken into custody upon civil process—such as a *ca. sa.* for instance, the reason assigned being that if such an arrest or taking into custody were held to be good, this would enable a plaintiff in a civil proceeding to take an advantage of his own wrong. In one of the cases, *Re Alfred Egginton*, 2 E. & B. 717 there seemed to be room for question as to whether the proceedings under which the second arrest was made, or sought to be made, was a civil or criminal proceeding, and the Court took occasion to say that they thought it a civil proceeding, and treated it as such: pp. 729 and 730.

In a criminal proceeding, there is, as it appears to me, no room for the existence of that reason, as there is no individual to derive an advantage from his own wrong; and so far as I can perceive, the doctrine invoked, is confined to cases in which the second process is a civil and not a criminal proceeding.

The plaintiff also placed reliance upon the decision in *Jones v. Grace*, 17 O. R. 681. In that case, the action was against the magistrate who issued the warrant in the county of Brant; or at all events he was the one of the defendants against whom the judgment was recovered. Upon the special findings of the jury, the conclusion was arrived at that he, by giving directions or instructions, was a party to the arrest of the plaintiff in the county of Haldimand under his warrant, with, as the law then stood, an unauthorized endorsement upon it by a magistrate in the county of Haldimand; and the holding, as I understand it, was that as the arrest in Haldimand was illegal and an

Judgment.
Ferguson, J. act to which the magistrate who issued the warrant was a party, that this act was done in excess of the legal authority, and that there was, therefore, a trespass *ab initio*; that there was an abuse of the authority, and that the case fell under the first resolution in *Six Carpenter's Case*, Smith's L. C. at p. 144.

The facts of that case differed from the facts of the present case, and I do not see that the decision is necessarily applicable here.

After the best consideration I have been able to bestow upon the present case, I am of the opinion that the taking of the plaintiff into custody under the warrant after it was properly endorsed in Toronto, was quite justifiable and well authorized, notwithstanding that he was in illegal custody up to that time on a criminal charge, or supposed criminal charge, for it is nowhere said or contended that the proceedings upon this warrant were anything but criminal proceedings.

I am of the opinion that for and in respect of all that is shewn to have happened or occurred to the plaintiff from and after the time of his being taken into custody under the warrant so endorsed, there appears good legal justification; and that the learned Judge was quite right in charging the jury on the subject of the damages as he did, and I do not perceive any ground for disturbing the verdict; nor do I see that anything should be done in respect to what was mentioned regarding the costs.

I think this motion should be refused with costs.

G. A B.

[CHANCERY DIVISION.]

WORTHINGTON ET AL. V. PECK.

Principal and Surety—Extension of Time—Consent—Discharge of Co-Surety—Payment—Contribution.

Where one of several sureties has been released by the creditor giving time to the principal debtor, with the consent of the other sureties, the latter, cannot upon payment of the debt, recover contribution from the co-surety.

Three out of four sureties on a note obtained from the holder an extension of time by a renewal during the absence and without the consent or approval of the fourth surety, the holder retaining the original note.

After payment of the renewal by the three who had obtained the extension, they brought an action against the fourth for contribution.

Held, that they could not recover.

THIS was an action brought by James Worthington, and Statement.
two others against Nelson Byron Peck for contribution under the following circumstances.

The plaintiffs and the defendant joined in making a note in favour of the Ontario Pump Company, which note was endorsed by the company to the Quebec Bank, and in which the company was the principal debtor and the plaintiffs and defendant were sureties.

The bank which held the note was aware of the relative position of the parties, and when it matured (which happened during the absence from the country of the defendant) renewed it without getting his consent in any way, but retained the original note.

Subsequent renewals were made in the same way, and the amount was reduced by payments made by the principal debtor, when the plaintiffs were obliged to pay in full.

This action was then brought for contribution to compel the defendant to pay his fourth share of the amount paid to retire the last renewal note.

The other material facts appear in the judgment.

The action was tried at Toronto on January 22, 1894, before FERGUSON, J., without a jury.

Argument.

H. T. Beck, for the plaintiffs. The giving of the first renewal by the plaintiffs operated as a payment, and the defendant then became liable to pay his share. A release *quoad* the creditor does not necessarily operate as a release between the sureties: *Brandt on Suretyship and Guarantees*, 2nd ed., sec. 277. A discharge of a surety from liability will not release from contribution: *Clapp v. Rice*, 15 Gray (Mass.) 557; *Hill v. Morse*, 61 Me. 541. The discharge of a surety is not the same as the discharge of a primary debtor, and therefore a co-surety is not discharged: *Ex p. Gifford*, 6 Ves. 805. The giving of security for a debt is the equivalent of payment in cash: *Ralston v. Wood*, 15 Ill. 159, at p. 171. Payment partly in money and partly by note is a good payment: *Pinkston v. Taliaferro*, 9 Ala. 547. See also *Dunn v. Slee*, 1 Moore 2; DeColyar's Law of Guarantees, 2nd ed. 368.

Marsh, Q. C., contra. An agreement to extend the time of payment for a definite term will release the surety: *Bolton v. Buckenham*, [1891] 1 Q. B. 278. The acceptance of a renewal note suspends the right of action upon the original note and may release the surety: *Maclaren's Bills, Notes and Cheques* 333; *Brandt*, sec. 277. The retention of the original note does not alter the nature of the transaction: *Hubbard v. Gurney*, 64 N. Y. 457; *Walters v. Swallow*, 6 Wharton (Penn.) 446. The agreement to give time need not be express, it is sufficient if intended and understood: *Brandt*, sec. 351; *Brooks v. Wright*, 13 Allan (Mass.) 72. If the note is taken merely as collateral security or additional security the surety may not be released: *Brandt*, sec. 366; *The Liquidators of Overend Gurney & Co. v. The Liquidators of the Oriental Financial Corporation*, L. R. 7 H. L. at p. 361. If the creditor extending the time desires to reserve his rights against the surety he must do so expressly and distinctly: *S. C.*, at p. 348; *Boulton v. Stubbbs*, 18 Ves. at p. 22; *Brandt*, sec. 376. A surety has no greater rights against a co-surety than the creditor has against both: *Brandt*, sec. 267. If one only of two sureties consents to giving an extension

of time and subsequently has the debt to pay he cannot recover contribution from the other surety: *Tobias v. Rogers*, 13 N. Y. App. (Kernan) 59; *Staples v. Gokey*, 34 Hun (N. Y.) at p. 290; *Waggoner v. Walrath*, 24 Hun (N. Y.) at p. 447; Brandt, sec. 280. The release of one co-surety releases the other whether the release be by deed or operation of law: *Cheetham v. Ward*, 1 B. & P. 634; *Nicholson v. Revill*, 4 A. & E. 675; *Ward v. The National Bank of New Zealand*, 8 App. Cas. 755.

Ex p. Gifford, 6 Ves. 805 and 6 Rev. Rep. 53 does not support the text in De Colyar's Law of Guarantees, 2nd ed. pp. 368, 369, that it is settled that the right of contribution is not destroyed by the discharge of a surety by the creditor; see also, *Kearsley v. Cole*, 16 M. & W. 128; *Evans v. Bremridge*, 2 K. & J. 174; Smith's Principles of Equity, 2nd ed. 355; Snell's Principles of Equity, 10th ed. 594.

Beck in reply. No equitable doctrine will be interfered with by the plaintiffs recovering under the circumstances of this case. The plaintiffs were compelled either to pay the note or sign a fresh note, and in principle the defendant should be bound to contribute.

January 26, 1894. FERGUSON, J.:—

The action is for contribution from an alleged co-surety. It is brought by three plaintiffs, who were with the defendant, co-sureties, for a company upon a promissory note in favor of a bank for the sum of \$7,000. The note was signed by the principal and the four sureties, all as makers, but it was agreed on all hands that the company was the principal debtor, and the four (the three plaintiffs and the defendant), co-sureties, and that this was well known to the bank.

After the bank had advanced the money upon this note the defendant went to England, and when the note fell due, was still absent. The principal debtor and the three sureties that were here (the three plaintiffs) renewed the

Judgment.
Ferguson, J. note by giving another note, which was not signed by the defendant. The defendant was not a party to this transaction, nor did he in any way, so far as appears, assent to it.

After this there were many renewals of the note, always by the principal debtor and these three plaintiffs, but none of them were acquiesced or concerned in or assented to by the defendant. The principal debtor had, however, from time to time made payments on account of the notes, so that the later renewals of it were for sums much smaller than the original sum, \$7,000. Finally, these three plaintiffs were called upon to pay and did pay the sum of \$1,875 to retire the last one of these renewal notes, and this action is brought to recover from the defendant what is called his contribution towards making up this sum. This would be, as I understand the matter, the one-fourth of the amount, about \$469 (a few cents less). I am stating the facts from recollection only. I have not been left any papers, not even the record.

The defendant's contention is that, by the first renewal of the note, time for payment of the amount was given to the principal debtor in a manner binding upon the creditor without his (the defendant's) consent or concurrence, and in this way he became discharged from liability to the creditor; that he never thereafter did any act whereby he became again liable as surety, or otherwise, in respect of the original debt or any part of it to the creditor, and all this being so, he was not at the time of the payment of the money by the plaintiff's, co-surety with them at all, and therefore, not liable to pay the claim now made upon him.

The first renewal of the note had, I apprehend, the effect of suspending the right of action upon the original note during the currency of the renewal note. This being so, and the well-known principle applied, the result would be that the surety, not assenting to the giving of time in this binding way to his principal, would, as to the creditor, be discharged from liability.

There was no agreement or understanding that the first renewal note or any of the subsequent ones should be taken by the creditor as payment, and the original note for the \$7,000 was not surrendered on getting the renewal note. The creditor, the bank, continued to hold the original note, and it seems plain that the effect of the transaction of the first renewal was, as stated above: Brandt on Suretyship and Guarantees, 2nd ed., sec. 363. Judgment.
Ferguson, J.

It was not contended, nor could it be, as I think, that the renewal note was a collateral security. There was no pretense that the sureties contracted severally only; their contract and suretyship was joint, or joint and several: *Ward v. The National Bank of New Zealand*, 8 App. Cas. 755 at p. 765; also, *Evans v. Burridge*, 2 K. & J. 174.

The question then is, have the plaintiffs in these circumstances the right to recover what they call "contribution," from this defendant? On the argument an unusual multitude of cases and authorities were referred to by counsel. These I have been at much pains to examine. I have not found the precise point amongst the English authorities to which I was referred; most of them being in relation to points that seemed to me collateral only to the point to be determined.

I think this a case that may fairly be said to be one in which three out of four co-sureties consented to the creditor giving time to the principal debtor, and in which the fourth co-surety did not so consent, this fourth co-surety being this defendant.

In Brandt on Suretyship and Guarantees, 2nd ed., sec. 277, the author says, that "the release of one surety, without the consent of his co-surety, from liability to the creditor, will not discharge him from liability to contribute to the co-surety, who is subsequently compelled to pay the debt." And the same author at sec. 280 says: "If one of two co-sureties consents to the giving of time to the principal (debtor), and the other does not, and the one who so consents afterwards has the debt to pay, he cannot recover contribution from the surety who did not consent to the

Judgment. extension. The latter was discharged from his obligation
Ferguson, J. to the creditor, and likewise from contribution, by the extension."

I have examined the decisions referred to by the author as supporting his statements, and although the cases are different in their facts from the one before me, and differ in their facts from one another, I am of the opinion that they do fairly and clearly support what the author says. The proposition seems to me reasonable, and after much attention to the cases referred to and some others, finding nothing in the English books at variance with it, I adopt it as a proposition of law, and I think it has a direct application to the present case. I am, therefore, of the opinion that the plaintiffs cannot recover from the defendant the alleged "contribution," to recover which this action is brought, and that I am bound to dismiss the action.

I should have been better pleased if I had been able to arrive at the opposite conclusion, for there is little room to doubt that when the plaintiffs and the principal debtor renewed the note the first time, the plaintiffs did what they did, as the best thing to be done for all concerned; and it is also most probable that if the defendant had been here at the time he would also have signed this renewal note with the plaintiffs and have been in the same position as they, or rather, each of them throughout. For these reasons I think the defendant should have no costs against the plaintiffs.

The action is dismissed without costs.

G. A. B.

[CHANCERY DIVISION.]

MOORE V. KANE ET AL.

Notice—Constructive Notice—Release of Debt—Consideration—Bond fide Purchaser for Value without Notice—Mining Lands.

An unpatented and undeveloped mining property, the value of which was purely speculative, and the Government dues on which were unpaid, was conveyed to the plaintiff, the consideration mentioned in the deed being \$100, and he for the expressed, but not actual consideration of \$750 conveyed the property for the purpose of selling it for his own benefit to one of the defendants, who after holding it for a year conveyed it to his co-defendant, who had no actual notice of the circumstances, in consideration of the release of a debt of \$25 :—

Held, that the release of the debt was a sufficient consideration for the deed :—

Held, also, that taking the circumstances and character of the property into account, the last grantee, who had made no inquiry, was not by reason of the consideration expressed in the deeds to and from the plaintiff, put upon enquiry so as to affect him with constructive notice of the plaintiff's rights.

Decision of FALCONBRIDGE, J., at the trial reversed.

THIS was an appeal from the judgment of FALCONBRIDGE, Statement.
J., in an action brought by Charles Moore against William J. Kane and George Elliott to set aside two conveyances of a mining location, the fee of which was in the Crown subject to the payment of Crown dues, one of these conveyances being from the plaintiff to the defendant Kane, and the other from the defendant Kane to the defendant Elliott.

It appeared at the trial that the consideration in the conveyance to the plaintiff of the property in question, was \$100, and that he wishing to sell it had conveyed it in consideration, as expressed in the deed, of \$750 to the defendant Kane. The evidence as to the purpose of the last conveyance was conflicting; the plaintiff testifying that he placed the property in the name of Kane for the purpose of sale, and that they were to divide the proceeds, less the plaintiff's expenses; and Kane asserting that the property was a gift to him by the plaintiff.

The action was tried at the Assizes at Port Arthur, on June 17th, 1893, before FALCONBRIDGE, J., without a jury.

Judgment. *F. H. Keefer*, and *A. C. Boyce*, for plaintiff.
Falconbridge, *Graham*, for defendant Kane.
J. *H. Langford*, for defendant Elliott.

June 18, 1893. FALCONBRIDGE, J., orally :—

At the close of the case I entertained no doubt as to what my judgment should be as between Moore and Kane.

The account given by Kane, altogether apart from the evidence of Moore, the plaintiff, was contradictory, incredible and unsatisfactory in every way; therefore, as between Moore and Kane, there is no question the plaintiff is entitled to the relief here sought.

The only thing I reserved was the position of Elliott. I think there is evidence upon which the Court might be justified in finding there was not such a good consideration and want of notice as would support the transaction in any aspect of the case between Kane and Elliott. I point to the fact that the conveyance was taken for a debt—for only a portion of an old debt—and that the expressed consideration, \$25, was not paid then, or allowed then, but appears to have been made a month or two before, on the maturity of a note for \$125, due by Kane to Elliott—the note being renewed for \$100, without any payment being made by Kane, or allowance spoken of; and no particular enquiry seems to have been made by the alleged purchaser as to the value or position of the property.

Staring him in the face, if he chose to look at the instrument even in the most casual way, was the consideration, large enough certainly when compared with the amount he says he was willing to allow for it, to have awakened curiosity, and to have put him on enquiry; yet, in the face of that, he chose to accept conveyance of a half interest in a valuable property, for the paltry sum of \$25, allowed on an old debt due by Kane to him, in the way and at the time I have mentioned. Elliott not having made the enquiries called for by the circumstances as presented to him, must abide by the natural result.

Reference has been made to the equities. The only conveyance that could be made was that of an equitable interest; therefore, the equities would attach, as they attached, between the plaintiff and Kane. The judgment can only be for the plaintiff.

Judgment.
Falconbridge,
J.

I therefore direct judgment to be entered, declaring Elliott to be a trustee for the plaintiff, and declaring that the deeds, that from Moore to Kane, and that from Kane to Elliott, are void, and at the same time ordering that these deeds be delivered up to be cancelled with full costs of the proceedings.

I do not think this is a case in which I should stay proceedings. On the faith of the representations of Moore, the plaintiff, which I find to be supported by the evidence and the surrounding circumstances, a large sum of money (said to be between \$1,100 and \$1,500) has been expended on the property, in improving and developing it. Unless a substantial payment (say \$1,200) is made into Court by these defendants, there will be no stay of proceedings.

From this judgment the defendant Elliott appealed to the Divisional Court, and the appeal was argued on December 19th, 1893, before BOYD, C., and FERGUSON, J.

Rowell, for the appeal. The evidence of Kane shews the plaintiff made him a present of the property. Even on plaintiff's own evidence he placed it in Kane's name and under his control, and Elliott is a purchaser for value. The release of a debt is a sufficient valuable consideration to support a conveyance. There is nothing in the contention that the discrepancy in the consideration paid by Elliott and the consideration mentioned in the deed should have put him upon enquiry. The value of undeveloped mining lands is purely speculative, and it cannot be said that it was not a good and sufficient consideration for the lands in question; and the simple fact that to the knowledge of Elliott the deed from the plaintiff to the defendant Kane shewed a consideration of \$750, is not sufficient to put him

Argument. upon enquiry as to plaintiff's title. Elliott is a holder for value without notice. The plaintiff by conveying the property to the defendant Kane put it in his power to dispose of the property to an innocent purchaser, and if either party must suffer through the fraud of Kane, it must be the party who enabled him to commit the fraud on the plaintiff. As to constructive notice, I refer to *Jones v. Smith*, 1 Ha., at p. 55; *Ware v. Lord Egmont*, 4 D. M. & G. 460.

E. T. English, contra. Kane was merely a trustee for the plaintiff, and the trial Judge so found. He was a mere agent to dispose of the property for the plaintiff. The deed was only given to facilitate dealing with it. The evidence shews Elliott was solicitor for Kane and his creditor as well, and knew his circumstances. Elliott had the deeds, and the deed to Kane shewed a consideration of \$750, which Elliott must have known Kane could not have paid, so that that in itself should have been evidence to him that something was wrong, that it did not correctly shew the transaction, and so he should have been put upon enquiry. He also knew the plaintiff and made no enquiry from him. He wilfully closed his eyes. The circumstances were suspicious, and the trial Judge was right in so finding.

Rowell, in reply, referred to *Rice v. Rice*, 2 Drew. 73; *Brocklesby v. Temperance Permanent and Building Society*, [1893] 3 Ch. 130; *Gordon v. James*, 30 Ch. D. 249; *Hunter v. Walters*, L. R. 7 Ch. 75.

February 15, 1894. BOYD, C.:—

Briggs v. Jones, L. R. 10 Eq. (1892), illustrates the very reasonable proposition that where the owner of land transfers it to another, so as to enable him to deal with it as his own, he is guilty of such culpable imprudence that he cannot afterwards assert his title as against rights which that other may have created for value in favour of an innocent third party. That is this case; the act of the plaintiff in making a conveyance to Kane, and letting him hold it for over a year, enabled Kane to convey to Elliott.

The only question is, whether this last holder is a purchaser for value without notice. The debt of \$25 which was cancelled and treated as paid between the defendants, was a sufficient valuable consideration, though no money actually passed, according to the holding in *Johnston v. Reid*, 29 Gr. 293.

Then the only other point is; had Elliott notice of the equity of the plaintiff as between him and Kane? No actual notice is pretended, and the matter rests upon whether constructive notice is to be imputed to the defendant in the circumstances of this case.

Now, it is to be observed, that the Courts are against any extension of the doctrine of constructive notice: *Montefiore v. Brown*, 7 H. L. C. at p. 262. And in a more recent case Brett, L. J., said: "Anything 'constructive' ought to be narrowly watched, because it depends on a fiction": *Allen v. Seckham*, 28 W. R. 27; 11 Ch. D., at p. 795.

The chief point urged is, that the figures in the deeds shewing the consideration must have led the defendant to conclude that the transaction by which the land was vested in Kane was unreal. The deeds Elliott saw, was one in which the land was conveyed to the plaintiff, 7th October, 1889, for \$100, and the other, by which it was conveyed to Kane, on 15th December, 1890, for \$750. But it is well known that these mining lands are of speculative value, and that the figures expressed in conveyances thereof are but seldom according to the hard facts.

It is not proved that these lands were of any substantial value at the date of the impeached transaction—they were unpatented and subject to Crown claims, and for some time the defendant Elliott would not make any offer respecting them because of their supposed little worth. At length it was agreed that he should get a deed from Kane of what appeared to be vested in him in consideration of the cancellation of an outstanding debt of \$25, and this was carried out by the execution of a conveyance of grant and quit claim of 27th January, 1892.

Judgment.

Boyd, C.

Judgment.

Boyd, C.

The defendant Kane says he told Elliott that he was owner of the land. Beyond that the defendant Elliott made no enquiries but relied upon the deeds as shewing the dealing with the lands, and it can hardly be said that this abstinence from further enquiry—where the paper title and the deeds told their own tale—is to be treated as evidence of either fraud or negligence on the part of Elliott. And in the absence of notice proved, notice will not be imputed if the purchaser has not been guilty of fraud or negligence: *Jones v. Smith*, 1 Ha., at pp. 55-6, *per* Wigram, V. C.; and in a later case the Vice-Chancellor explained the point further by saying that the negligence must be so gross as that a Court of Justice would treat it as evidence of fraud, and visit it with the consequences of fraud: *West v. Reid*, 2 Ha., at p. 257. See *Lloyd's Banking Co. v. Jones*, 33 W. R. 782; 29 Ch. D. 230.

There is nothing here to suggest that Elliott abstained sedulously from making inquiry for the purpose of avoiding notice, or that he carried out the transaction with lack of ordinary diligence with a view of profiting by his ignorance. I do not see even want of caution in his dealing for he had the paper title complete before him, and he knew that the chances of making or losing money in the undertaking were about evenly balanced.

The fact of the interest that was dealt with being an equitable one, because the fee was yet in the Crown, does not seem to be a circumstance that lets in "all the equities" as regard a purchaser for value without notice. He is after a conveyance equally protected whether he gets a legal or equitable estate, if he be entitled to the status of a *bonâ fide* purchaser: *Bailey v. Barnes*, [1894], 1 Ch. 25.

I think the judgment should be entered for the defendant Elliott. The defendant is willing to reconvey to the plaintiff on being repaid his \$25 and costs, and renews this offer in open Court. Formal judgment may be delayed to see if this offer is accepted.

FERGUSON, J.:—

Judgment.

Ferguson, J.

The only question is as to whether or not the defendant Elliott occupies the position of a *bonâ fide* purchaser for value without notice.

Although the evidence of the defendant Kane is most unsatisfactory, yet looking at the evidence of the defendant Elliott on the subject, one cannot, I think, reasonably doubt that there was, as the consideration for the deed from Kane to Elliott, the sum of \$25 by way of extinguishment or cancellation of an existing debt, owing from Kane to Elliott. There had been a promissory note made by Kane in favour of Elliott for the sum of \$125. According to Elliott's evidence this had been renewed to the extent of \$100, leaving the \$25 to be paid by Kane as soon as he could do so, and in lieu of this \$25 being paid, the conveyance to Elliott was made. Elliott's evidence is plain on the subject, but Kane's is not. I think this must be taken as proved.

Then looking at the decision of the late Chief Justice Spragge, when Chancellor, in the case *Johnston v. Reid*, 29 Gr. 293, at pp. 298 & 299, one cannot say that the cancellation and extinguishment of this debt was not a good consideration. It cannot, I think, be said that Elliott was a mere volunteer. True it is that this consideration seems small, but the circumstances and character of the property must be taken into account before arriving at the conclusion that it is so small as to afford an inference of wrong-doing on the part of Elliott, who, in his evidence, seems to state the position in this respect fairly enough as far as I can see. The purchase money had to be paid to the Government. The property might have proved to be of no value as many mining locations have proved to be, and Elliott took the chances in this regard when he relinquished his claim for the \$25 and accepted the conveyance.

There is no pretence that Elliott had actual notice of the facts in respect to the plaintiff's rights or alleged rights. What is contended is that he had "constructive notice."

Judgment. He had before him a former conveyance of the property from Barnes to Moore, the plaintiff, for the expressed consideration of \$100, and the conveyance from Moore to Kane in which the consideration expressed is \$750, the former dated in October, 1889, and the latter in December, 1890; the conveyance to him being taken in January, 1892, in which the \$25 is the expressed consideration.

The two conveyances and the statement of the defendant Kane that the property belonged to him seem to have been the information that Elliott had when he made the transaction with Kane. The contention is that, having this information, he was so put upon inquiry that he was bound to investigate the title throughout, and if he had done so he would have discovered the plaintiff's now alleged claim. Elliott says that he made no inquiry or investigation whatever. He looked upon the transaction as a sort of "gambling" one.

In the case *Jones v. Smith*, 1 Ha., at p. 55, a very learned Judge says: "It is scarcely possible to declare *a priori* what shall be deemed constructive notice, because, unquestionably, that which would not affect one man may be abundantly sufficient to affect another."

In that case the learned Judge points out that there are two cases where the doctrine applies: (1) Where the party charged has notice that the property in dispute is encumbered or in some way affected, in which he is deemed to have notice of the facts and instruments, to a knowledge of which he would have been led by due inquiry after the fact that he actually knew. (2) Where the conduct of the party charged evinces that he had a suspicion of the truth, and wilfully or fraudulently determined to avoid receiving actual notice of it.

In that case the mortgagee had notice of the fact that there was a marriage settlement, but was told that it did not embrace the husband's property, and he advanced his money on the security of the husband's property without seeing the settlement, and it was held that the mortgagee was not affected with constructive notice of the settlement.

It is also stated in the same case that negligence may be evidence of, but is not the same thing as *mala fides*. Judgment.
Ferguson, J.

In the case *Ware v. Lord Egmont*, 4 D. M. & G. 460, the decision is that the question when it is sought to affect the purchaser with constructive notice is not whether he had the means of obtaining and might by prudent caution have obtained the knowledge in question, but whether the not obtaining it was an act of gross and culpable negligence.

In the case *Brocklesby v. Temperance Permanent Building Society*, [1893] 3 Ch. 130, the owner of the land had deposited the title deeds with a bank to secure an advance of £750. Being desirous of obtaining a further advance of £1,500, he authorized his son to borrow £2,200 from another bank and gave him a written authority to receive the deeds from the first-mentioned bank on payment of the sum due them. The son fraudulently pledged the deeds to a bank different from that which had been proposed for a much larger advance than that which he was authorized to borrow, forging his father's name to a promissory note and a deposit note, and it was held that the father could not redeem the property, he having placed the deeds under the control of his son, without paying the whole amount that his son had received upon them.

The case *Rice v. Rice*, 2 Drew. 73, is the case of a vendor who conveyed without having received his purchase money, but endorsed on the deed a receipt for it and gave the title deeds to the purchaser who made a mortgage on the property, and absconded. It was held that as between the vendor's lien for his unpaid purchase money and the right of the mortgagee, the possession of the title deeds and the fact of the endorsement of the receipt on the deed, gave the mortgagee the better equity.

In the present case the plaintiff on his own shewing made the conveyance to Kane and gave him possession of the deed, and the conveyance from Barnes to himself so far as is shewn the only title deed he had. He trusted

Judgment. Kane and placed him in a position to deceive him (that Ferguson, J. is leaving Kane's evidence out of the case, for he says that Moore gave him the property out and out, but curiously enough admits that if he should sell, Moore would be entitled to half the purchase money); and looking at the facts so far as they are disclosed, in the light of the authorities that I have referred to, I fail to see how it can be contended with success, that the defendant Elliott was so negligent in the matter of his purchase as to be affected with constructive notice of the right of the plaintiff that is now asserted.

As I have already said, the difference in the amounts of the expressed considerations in the conveyances, would not, in the circumstances, be sufficient in my opinion, to notify Elliott that anything was wrong, or that any person but Kane had any claim to or upon the property.

Then what other fact came to the knowledge of Elliott? Kane had the deeds and asserted that he owned the property. The conveyance from Moore to Kane had endorsed upon it a receipt signed by Moore for the full expressed consideration, \$750.

Kane was completely armed by Moore with all that was necessary to support and sustain his assertion to Elliott that he was the owner of the property.

I am of the opinion that the plaintiff's case fails as against the defendant Elliott, and I leave the matter of the offer made in Court and the entry of the judgment in the position the Chancellor has, for the present, assigned them.

G. A. B.

[CHANCERY DIVISION.]

TIFFANY V. MCNEE ET AL.

METCALF V. MCNEE ET AL.

*New Trial—Jury—Improper Conduct towards—Motion for New Trial—
Time when to be Made.*

During the trial of an action for libel the defendants published in their newspaper a sensational article with reference thereto. The plaintiffs' solicitor was aware that the article had come to the hands of one or more of the jury, but did not bring the matter to the notice of the Court, or take any action with respect to it, and proceeded with the trial to its close when the jury brought in verdicts for the defendants. Upon a motion for a new trial upon the ground of improper conduct towards and undue influence upon the jury :—
Held, that the application was too late.

THIS was a motion on the part of the plaintiff for a new Statement. trial in the action of *Tiffany v. McNee*, the result of which was also to apply to the action of *Metcalf v. McNee*.

The actions were for libel, and were tried together at Windsor on April 13th and 14th, 1892, before STREET, J., with a jury.

Osler, Q. C., *A. H. Clarke*, and *J. F. Hare*, for the plaintiffs.

G. T. Blackstock, Q. C., and *A. R. Bartlett*, for the defendants.

It appeared that all the evidence had been put in by two o'clock of the day of the trial, and it was anticipated that the trial would be finished that day. The defendants published on the same day in the evening edition of their newspaper a sensational article referring to the trial. The trial did not, however, conclude on that day, and the article came to the hands of and was read by one or more of the jurymen the same evening. The plaintiffs' solicitor was aware that the article had come to the knowledge of the jury before the trial proceeded next morning, but no motion was made, nor was the matter brought to the attention of the Court.

The jury brought in verdicts for the defendants.

Argument.

The motion was made to the Divisional Court, and was argued on June 29th, 1892, before BOYD, C., and FERGUSON, J.

Osler, Q. C., for the motion. There are affidavits made by jurors on the files and they should be taken off; they should not be received or read. The defendants' conduct in the publication of the article was improper. The evidence shews it came to the knowledge of some of the jury. Their verdict was improperly influenced: *Farquhar v. Robertson*, 13 P. R. 156; *United States Express Co. v. Donahue*, in note at p. 158, and cases there collected; *Coster v. Merest*, 3 B. & B. 272; *The Queen v. Michael Murphy*, L. R., 2 P. C. 535; *Widder v. The Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 520; *Van Mer v. Farewell*, 12 O. R., at p. 294.

G. T. Blackstock, Q. C., contra. There is no authority for this motion, which is novel and unprecedented. A motion to discharge the jury should have been made as soon as any of the parties became aware of the facts. This was not done, but the plaintiffs finished the trial and took the chance of the verdict being in their favour. This motion is now too late. The affidavits of the jurors are rightly filed and should be read: *Thompson & Merriam on Juries*, secs. 396, 397 and 446; *Widder v. The Buffalo and Lake Huron R. W. Co.*, 24 U. C. R., at p. 534.

Osler, Q. C., in reply. There was no time to decide what to do before the trial finished.

September 16th, 1892. BOYD, C.

Had this application been made at the time when the plaintiffs were aware of the issue of the newspaper with the account of the first day's trial, it should have received a more favourable consideration than can now be given to it. But knowing of its issue and its perusal by at least one of the jury, they elect to proceed with the trial and take their chances, and the result is adverse to them.

Lord Kenyon, in a forcible medley of metaphor, long ago adverted to the mischievous results of interfering with the jury prior to or pending their deliberations. In *The King v. Jolliffe*, 4 T. R., at p. 289, he is thus reported: "If an individual can break down any of those safeguards which the constitution has so wisely and so cautiously erected, by poisoning the minds of the jury at a time when they are called upon to decide, he will stab the administration of justice in its most vital parts."

Judgment.
Boyd, C.

But the cases all shew that the application is to be made forthwith to discharge the jury or to postpone the trial, if the interference is known to the party aggrieved prior to verdict rendered.

In *Coster v. Merest*, 3 B. & B. 272, but more fully given in 7 J. B. Moo. 87, the printed paper complained of had been circulated among the jury at the trial, but this was not known to the party moving till afterwards. The Court there proceeded on the principle that it was a fundamental rule that a cause should proceed with the utmost impartiality, and would not allow the verdict to stand.

This is an authority which would probably have induced the trial Judge to stop the case and discharge the jury, even though the account may have been published under the supposition that the trial would have finished before the paper was seen by the jury.

That would eliminate any such element as contempt of Court in the publication, but none the less would the character of the article appear calculated to influence the public mind, and therefore the jury, against the plaintiffs.

Another case not cited is worth consulting as shewing where the Court will draw the line, *Spencely, q. t., v. De Willott*, 3 Smith 321, where a printed statement of the evidence of the chief witness was distributed among other witnesses, but it did not appear how many were actually distributed, nor did it appear that the jury had seen any of them. The facts relied on were not discovered till after trial, and the Court declined to interfere. Lord Ellenborough said, at p. 323: "In order to make this a founda-

Judgment. tion for a new trial, it should be shewn that the paper had
Boyd, C. some effect actual or probable on the verdict; but it is not
brought within the sphere of the jury, and it does not
appear that any were given away where they were. * *”

In this case, however, the defendants procured the publication: it was intended for public circulation: it came to the hands of some or one of the jury: and it was calculated to influence the jury. But I think the application is too late. *Widder v. The Buffalo and Lake Huron R. W. Co.*, 24 U. C. R., at p. 534, circumstantially different, is yet in point as to the proper practice in cases of this sort. It appears to be well decided, and has long stood as an unchallenged authority, which rules out the present motion.

I would mark my sense of the defendants' precipitate conduct (to say the least) by giving no costs in dismissing this application.

FERGUSON, J. :—

This case, which is in this, the Chancery Division, and the case *Metcalf v. McNee* in the Queen's Bench Division of the Court, were tried together before my brother Street with a jury, at Sandwich. The cases are both actions for alleged libels, and are so much alike that it may fairly be said that the evidence must be common to both. They seem to have been actions that were very properly tried together. The verdict in each case was for the defendants.

This motion is made in *Tiffany v. McNee*. Counsel however agreed that the arguments and the result should equally apply to the case *Metcalf v. McNee*, and that that case should be for the purposes of the motion and the judgment thereon, as if it had been properly transferred to this Division and the motion made therein as well as in the other case.

The motion is to set aside the verdicts on the ground that the defendants published in their newspaper a sensational article after the evidence at the trial had been concluded, but before the rendering of the verdicts; which

came to the hands of the jury, and should be presumed to have influenced their deliberations. It was said, and such appears to be the fact, that the verdicts were upon the issues raised upon the pleas of justification. As to the actual merits of the cases, we have, as I understand the position, no concern here. The evidence taken at the trial is not before us, and it was contended that not having this we should not even read the charge of the learned Judge. Judgment.
Ferguson, J.

Affidavits of a large number of the jurors who tried the cases were offered in evidence upon the motion for the purpose of shewing that, except in a couple of instances, the jurors had not seen or read the sensational article referred to, and that the jury were not in any degree influenced by it in deliberating and determining upon their verdicts.

As to whether or not these affidavits, or any of them, should be received and read there was much contention and many authorities were referred to by counsel. Most of these authorities I have perused, but, in the view that I have taken, it does not seem necessary to decide this question, as the motion should, I think, be disposed of upon an entirely different ground.

From what was stated at the bar, the sensational article itself, and what was read from an affidavit made by the plaintiffs' solicitor, it appears that the evidence in the cases had been concluded at between one and two o'clock in the day, and it was probably supposed that a verdict would be reached the same evening. Counsel having, however, occupied the afternoon with their addresses to the jury, the cases were postponed or stood over till the following morning.

The so-called sensational article appeared in the evening issue that day of the defendants' newspaper, thus after the evidence had been given and before the verdicts.

The affidavit of plaintiffs' solicitor, Mr. Clarke, which was read upon the motion, but which I have not now, stated that on the morning of the day on which the

Judgment. verdict was rendered and, as I understand, before the opening of the Court on that day, he heard two of the jurymen who were trying the cases speak of this sensational article, that they had seen it or read it, or to this effect.

It is a matter not disputed, that on this morning of the day on which the verdicts were rendered the plaintiffs' solicitor was aware of what is now complained of by the plaintiffs. It is also said that at or soon after the opening of the Court that morning the matter was known to and spoken of by counsel, but their recollections do not exactly coincide as to what passed between them. The trial, nevertheless, went on to the conclusion without any motion or anything being done in respect of it. The learned Judge was not even (as I understand) informed in any way of the circumstance.

Counsel for the plaintiffs on the argument said and admitted that unless this case can be distinguished from the case *Widder v. The Buffalo and Lake Huron R. W. Co.*, 24 U. C. R., at pp. 533 and 534, the motion must fail.

There are almost always some differences in the facts of cases, but these differences are very frequently not such as to render the cases distinguishable as cases of authority, and I cannot but think that the present case falls under the proposition stated in that case where the learned Judge, at p. 534, in delivering a judgment that was concurred in by the other members of the Court, after referring to authorities, said: "Independently of authority, the reason of the thing would naturally suggest that a plaintiff, clearly aware of a fatal objection to a jury about to try his case, should not, after electing to take his chance of a verdict, be heard urging an objection which he was quite willing to waive had the verdict been in his favour."

Counsel (very properly, I think), called attention to the fact, that in the present case all or nearly all the expense of the preparation for and of the trial had been incurred before any knowledge or even the existence of the circumstance complained of, saying that if a motion had been

successfully made these expenses would have been lost ; Judgment.
and if such a motion had been made and failed the plain- Ferguson, J.
tiffs should, most probably, have, in consequence of it, been
prejudiced in respect of their chances of obtaining verdicts
from the jury.

All this does not, I think, take the case from under the
proposition I have referred to. It would, of course, have
been a misfortune that so great expenses should have gone
for naught on the one hand, or that on the other hand,
there should possibly have been the prejudice alluded to.
These, though serious indeed, seem to me to fall amongst
the misfortunes of litigation. The plaintiffs' cases, as I
think, clearly remain, nevertheless, under the proposition
stated by the learned Judge before referred to. They did,
with full knowledge of what is now complained of, elect to
take their chances of obtaining verdicts from the jury in
their favour, and I do not see how the difficulties of the
situation so clearly pointed out by counsel and before
referred to, can make any difference in the application of
the principle or relieve the plaintiffs from the effect of the
election so made.

No doubt that public journalists, having the very great
influence and means of influence they have ought to be
careful in their publications, and especially when they
themselves are suitors, not to prejudicially interfere with
the administration of justice in pending suits or actions.

In the present case, however, I do not see that there is
any sufficient ground for thinking that the defendants had
any intention so to interfere. If they thought of the
immediate subject at all they most probably thought that
there would be a verdict one way or the other before the
issue of their paper containing the so-called sensational
article would reach the public, or, at all events, would, in
the circumstances, reach the jury, or any of them. I think
the motion fails, and should be refused.

Motion refused without costs.

G. A. B.

[COMMON PLEAS DIVISION.]

IN RE WALLACE V. VIRTUE.

Prohibition—Division Court—Jurisdiction—Amount Ascertained by Signature—R. S. O. ch. 51, sec. 7, sub-sec. (c).

The defendant covenanted in a lease to pay the plaintiff \$210 on a certain date as rent reserved. A payment of \$34 having been made, leaving the sum of \$180.40 due for principal and interest, the plaintiff brought his action in the Division Court for that sum, and prohibition was applied for upon the ground that the claim was not within the jurisdiction of the Division Court :—

Held, that the original amount of the claim was ascertained by the signature of the defendant under sub-sec. (c) of sec. 7, R. S. O. ch. 51, and that the Division Court had jurisdiction.

McDermid v. McDermid, 15 A. R. 287, and *Robb v. Murray*, 16 A. R. 503, specially referred to and considered.

Statement.

THIS was a motion on behalf of Robert C. Virtue, for a prohibition to the Judge of the counties of Northumberland and Durham and to the plaintiff, in a certain plaint in the Fourth Division Court of those counties, in which the applicant Virtue was defendant, prohibiting them from further proceeding therein, upon the ground that the claim was for an amount beyond the jurisdiction of the Division Court. A notice disputing the jurisdiction had been given.

From the endorsement on the summons and the affidavit of the defendant filed upon this application, it appeared that the claim was for a sum of \$180.40, being the balance remaining of principal and interest, after giving credit for a payment of \$34, of a sum of \$210, which the defendant in an indenture of lease from the plaintiff to him, covenanted with her to pay on the 1st March, 1893, as rent reserved in the lease.

The motion was argued in Chambers, on 19th February, 1894, before STREET, J.

C. J. Holman, for the motion, cited *Robb v. Murray*, 16 A. R. 503; *Re McKay v. Martin*, 21 O. R. 104; *McDermid v. McDermid*, 15 A. R. 287; *The Manufacturers and*

Merchants Mutual Fire Ins. Co. v. Campbell, 1 C. L. T. Argument. 134; *Forfar v. Climie*, 10 P. R. 90; *Kinsey v. Roche*, 8 P. R. 515.

Douglas Armour, for the plaintiff, Mrs. Wallace, contra, cited *Re Graham v. Tomlinson* 12 P. R. 367; *Wiltzie v. Ward*, 8 A. R. 549.

March 2nd, 1894. STREET, J. :—

Under sub-sec. (c) of sec. 70 of ch. 51, R. S. O., the Division Courts have jurisdiction over "all claims for the recovery of a debt or money demand; the amount or balance of which does not exceed \$200; and the amount or original amount of the claim is ascertained by the signature of the defendant or of the person whom, as executor or administrator, the defendant represents."

We have here the defendant's covenant contained in a lease executed by him to pay to the plaintiff \$210 upon the 1st March, 1893, and an admitted payment or credit of \$34 in reduction of the amount; and it is contended upon the authority of *McDermid v. McDermid*, 15 A. R. 287, and the cases there referred to, and *Robb v. Murray*, 16 A. R. 503, that the original amount of the claim is not ascertained by the signature of the defendant.

The cases referred to have certainly gone a long way towards laying down the general rule that no case is within this section, unless the debtor after incurring the debt, has in writing acknowledged that he owed it, and set forth in writing exactly how much he owes. But these cases must, according to the well-known rule, be read as applying only to the special facts under consideration.

It has not yet been held, I think, that a promissory note or a covenant in a deed of any kind to pay an ascertained sum upon a day certain, free from any condition expressed, is not a claim which is ascertained by the signature of the defendant. It would, indeed, seem to be a contradiction in terms, to say that when the plaintiff makes out his case against the defendant by simply proving his signature and

Judgment. nothing more ; and is, thereupon, in the absence of a defence, entitled to judgment for the amount claimed, the claim is not "ascertained by the signature of the defendant ;" in such a case it is the signature of the defendant and nothing more, which ascertains the amount of the plaintiff's claim.

Street, J.

In such a case, it is true that the defendant may have a defence, that notwithstanding his covenant, he is discharged from liability in whole or in part by some event happening subsequent to the date of the note, or the making of the covenant ; but if the possibility of such a defence is to oust the jurisdiction of the Division Court, it must render the section practically a dead letter, for it is possible always after any admission of liability that defences of fraud or set-off may arise even at the last moment.

I understand the cases to go to the full length of deciding, that where a promise to pay is made in writing, which is either expressly or impliedly subject to a condition, the performance of which the plaintiff must prove before he can recover, the claim cannot be considered as having been ascertained by the signature of the defendant ; because there the amount must be ascertained, not only by that signature, but by proof of the performance of the condition.

From cases of this class, I think the present is clearly distinguishable, and there should, therefore, be judgment dismissing the motion and refusing the prohibition with costs.

G. A. B.

[COMMON PLEAS DIVISION.]

REGINA V. HOWARTH.

Medical Practitioner--Practising Medicine--Apothecary—R. S. O. ch. 148, R. S. O. ch. 151.

A person went into a druggist's shop, stating he was sick, and describing his complaint, which the druggist said he believed to be diarrhœa, and after advising him as to diet, gave him a bottle of medicine for which he charged 50 cents. The druggist stated that he had several kinds of diarrhœa mixture, and had sometimes to enquire as to symptoms in order to decide what mixture to give :—

Held, that this was practising medicine for gain within sec. 45 of the Medical Act R. S. O. ch. 148 :—

Held also, that the fact of the druggist being registered under the Pharmacy Act R. S. O. ch. 151, which entitled him to act as an apothecary as well as a druggist, did not authorize the practice of medicine.

The meaning of "apothecary" considered.

THIS was a motion to quash a conviction, for that the defendant not being registered pursuant to the Medical Act, did unlawfully practice medicine for hire, gain, and hope of reward, contrary to the form of the statute in such cases made and provided. Statement.

The facts are fully set out in the judgment of ROSE, J.

In Hilary Sittings, February 8th, 1894, before GALT, C. J., and ROSE, J., *Allan Cassels* supported the motion. The defendant was not practising medicine within the meaning of the Medical Act, R. S. O. ch. 148 ; and certainly not for gain, as he made no charge for advice, his charge merely being the fifty cents for the bottle of medicine he furnished. The defendant had a certificate under the Pharmacy Act, R. S. O. ch. 151, secs. 17 and 19, which entitled him to be registered as a pharmaceutical chemist, and to carry on the business of a chemist and druggist. Secs. 24, 29 and 31, shew he is entitled also to carry on the business or profession of an apothecary. He has the same rights and privileges which an apothecary has in England, namely, the right to practice medicine, to prescribe and make up prescriptions, this being one of the incidents following the introduction of the English law into Canada : *Regina v.*

Argument. *Hessin*, 44 U. C. R. 53; *Davies v. Macuna*, 29 Ch. D. 596, 600; *Apothecaries Co. v. Nottingham*, 34 L. T. N. S. 76; *Rose v. College of Physicians, London*, 5 Bro. Par. Cas. 553; *Apothecaries Co. v. Greenough*, 1 Q. B. 799, 804; *Apothecaries Co. v. Lotinga*, 2 M. & Rob. 495, 499; *Regina v. Coulson*, 13 C. L. T. 460.

Osler, Q. C., contra. There was practising medicine here, and for gain. It is impossible to distinguish what was paid for advice and what was paid for the medicine. The Medical Act, R. S. O. ch. 148, confines the practice of medicine to those registered under the Act; and if a druggist desires to practice medicine he must be registered under it: *Regina v. Hall*, 8 O. R. 407; *Regina v. Stewart*, 17 O. R. 4. The word "apothecary" has not the meaning ascribed it by the defendant. Apothecaries are merely druggists or pharmacists: Century Dictionary, tit., "apothecary," "chemist;" Apothecaries Chemical Index, p. 29. In England apothecaries have more extensive powers than they have here; but this is merely by reason of special statutes of local application. Apothecaries licensed by the Apothecaries Hall were entitled to practice medicine in the city of London and certain prescribed limits surrounding it; but in no other part of the British Isles. Subsequently the powers were extended to Scotland, and by subsequent Acts the powers were extended generally. These rights never extended to this country, and apothecaries are simply in the same position as apothecaries are in the United States, and as they were in the British Isles before their powers were extended. The case, which has been cited, of *Apothecaries Co. v. Nottingham*, 34 L. T. N. S. 76, is exactly in point. There the defendant, who was licensed as a druggist, was held liable for practising as an apothecary without being specially licensed therefor; and this case is also important, as it was an action for a penalty.

February 10, 1894. ROSE, J.:—

The prosecutor is one Thomas Wasson, a detective employed by the College of Physicians and Surgeons. One James McLaughlin, as I understood it, went to the

defendant's shop, and according to his evidence what took place was as follows: "I told the defendant how I felt. I told him I was sick. He told me to live on a milk diet; gave me the bottle of medicine produced and some pills. I paid him fifty cents." The defendant's account substantially agrees with this evidence. He said: "McLaughlin didn't say he had diarrhoea, but his description of his sickness led me to believe he had diarrhoea." The defendant, therefore, obtained from the complainant information as to his symptoms and from the diagnosis that he made of the case, prescribed what he believed to be the proper remedy. The defendant further said: "I have several kinds of diarrhoea mixture and have to enquire symptoms sometimes in order to decide which mixture to give." This shews the custom or practice of the defendant.

Judgment.

Rose, J.

Section 45 of R. S. O. 1887, ch. 148, being the Ontario Medical Act, enacts that "It shall not be lawful for any person not registered to practice medicine, surgery or midwifery for hire, gain, or hope of reward;" and provides for summary conviction.

I do not see how it can be contended upon this evidence that the defendant did not practice medicine. The cases of *Apothecaries Co. v. Nottingham*, 34 L. T. N. S. 76, and *Regina v. Hall*, 8 O. R. 407, are clear authorities in favour of such finding. There was certainly evidence upon which the magistrate might find that the defendant practised medicine.

Mr. Cassels contended that this was not practising medicine within the meaning of the section referred to; secondly, that if it was, it was not for gain; and, thirdly, that even if it was practising medicine for gain, the defendant was entitled as an apothecary, to do what he did. I think, as I have said, that it was practising medicine, and I have no doubt that, on the authorities, it must be held that it was practising for gain.

The defendant says that he charged no more for the medicine than if he had not given the advice; but we cannot divide the transaction and apply the consideration all to

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medicine. For the advice and the medicine the defendant received fifty cents. That he might charge somebody else the same figure for the medicine without the advice, does not, I think, entitle him to say that what he did was not for gain. There was evidence on this point before the magistrate. We cannot say that the magistrate improperly found that this was practising for gain.

Then was the defendant authorized to do what he did by the provisions of "The Pharmacy Act," R. S. O. ch. 151?"

Mr. Cassels' argument on this section was, as I understood it, as follows: Section 24 forbids any one "selling or keeping open shop for retailing, dispensing, or compounding poisons," etc., or assuming or using the title of "chemist and druggist," or "chemist," or "druggist," or "pharmacist," or "apothecary," or "dispensing chemist," or "dispensing druggist," in any part of the Province of Ontario, unless such person is registered under the Act and has taken out a certificate under the provisions section 18 of the Act.

It was argued that if a person registered and took out a certificate, he might then use the titles above referred to, and might practice as an apothecary; and section 31 was relied upon, which enacts that nothing in the Act shall prevent any person from selling goods of any kind to any person legally authorized to carry on the business of an apothecary, chemist, or druggist, etc.

I do not think this is a proper construction to be placed upon the statute. The two Acts, chapters 148 and 151, must be read together. Chapter 148, as we have seen, prohibits unregistered persons to practice medicine, and provides for registration of persons who have complied with the provisions of the Act. Chapter 151, prohibits persons to conduct the business of a chemist or druggist unless registered under the provisions of that Act. It further provides that legally qualified medical practitioners under any of the Acts relating to the practice of medicine and surgery in the Province, may be registered as

pharmaceutical chemists without undergoing examination, and that any member of the College of Physicians and Surgeons of Ontario, may engage in and carry on the business of an apothecary, chemist, or druggist without registration under the provisions of the Act.

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Mr. Cassels' argument would amount to this, that while a medical practitioner, unless he is a member of the College of Physicians and Surgeons, must register under the Act in order to carry on the business of a chemist or druggist, any registered chemist or druggist may practice medicine without qualifying under the Ontario Medical Act. The privilege given to the members of the College of Physicians and Surgeons to engage in and carry on the business of an apothecary, chemist or druggist without registration, makes it manifest that it was not intended by the Act that the mere fact of being a physician or surgeon, should qualify one to carry on the business of an apothecary, chemist, or druggist, without the permission of the statute. In other words, it was intended, I think, by the two Acts, to require a certificate of fitness to enable one to practice medicine, and a certificate of fitness to enable one to carry on the business of chemist or druggist. And if two persons, one practising medicine and the other carrying on the business of a chemist and druggist, would each be liable to penalties if they were not registered as provided by these Acts, it seems to me to be a *reductio ad absurdum* to contend that one person without registration may combine the practice of a profession of physician and surgeon with the carrying on of the business of chemist and druggist, and be exempt from the penalties under either Act; or, that by registering under the Pharmacy Act, he would be entitled to practice medicine without qualifying under the Medical Act.

The argument which Mr. Cassels rested upon the word "apothecary," was derived from the privileges granted to apothecaries in Great Britain by special Acts, and do not, I think, apply to the consideration of this statute. I think, however, full meaning and effect can be given to the stat-

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utes, as I have read them, when one considers the meaning of the word "apothecary," apart from express legislation. I find in the Imperial Dictionary the following definition: "One who practices pharmacy; one who prepares drugs for medicinal uses and keeps them for sale. Formerly, an apothecary merely compounded and dispensed the prescriptions of a physician and surgeon. The term is now, however, also applied in England to those who practice in medicine, and at the same time deal in drugs."

And when under section 31 of chap. 151, we find the words "nor shall anything in this Act prevent any person whatsoever from selling goods of any kind to any person legally authorized to carry on the business of an apothecary," I think full force and meaning may be given to them by holding that no one is authorized to carry on the business of apothecary, that is, to practice medicine, and at the same time deal in drugs, unless he is registered as a physician under the Ontario Medical Act, and also registered as a chemist and druggist under the Pharmacy Act. A certificate under the Pharmacy Act is a certificate of competency merely to conduct the business of a chemist and druggist.

To repeat what I have already said, the effect of the two statutes is to prevent any one from practising the profession of a physician or surgeon without a certificate under the Medical Act, and to prevent any one from carrying on the business of a chemist or druggist without a certificate under the Pharmacy Act; and a certificate under the Medical Act, except under the express provisions of the Pharmacy Act, would not entitle one to carry on the business of a chemist and druggist; nor would a certificate under the Pharmacy Act, without a certificate under the Medical Act, permit any one to practice medicine.

Mr. Baron Bramwell, in the above cited case of the *Apothecaries Co. v. Nottingham*, 34 L. T. N. S. 76, in charging the jury, said: "Perhaps you may think that a person has a right to practice as he likes, whether qualified or not; or, on the other hand, you may think that, whereas the

poorer classes have no opportunity of judging of or ascertaining the qualifications of the person to whom they resort for medical advice, the legislature should require such persons to possess proper skill and knowledge, and to obtain a certificate thereof. No doubt some persons like to go to unqualified practitioners so as to get advice cheap; but there is the law, and we have to observe it. If you think this man has 'acted or practised as an apothecary,' then you must find a verdict for the plaintiff. Indeed, I feel some little difficulty in putting the case to you, for on the defendant's own admission, he says he prescribed, and that, if a person brought a child to him suffering from, say diarrhoea, and asked what was good for it, he gave a medicine; if, however, the case was serious, he sent the doctor. Surely that is acting and practising as an apothecary within the meaning of the Act. * * Possibly, if on some one or two occasions a customer had gone to the shop and asked for medicine, and the defendant had said it was good for his complaint, that advising might be too trivial to be worth taking notice of by suing under this Act; but here the defendant admits that he dispensed, and at the same time advised medicine habitually."

Judgment.

Rose, J.

The above action was brought under the provisions of the Apothecaries' Act, 55 Geo. III., ch. 194, by sec. 14 of which before granting a certificate of fitness and qualification to practice as an apothecary, the Court of Examiners were authorized and required to examine the candidate for the purpose of ascertaining his skill and abilities in the science and practice of medicine.

I might add that, in my opinion, if one went to a chemist and druggist and told him that he had some particular complaint, and asked the druggist if he had any medicine compounded for such complaint or ailment, and purchased the medicine on the advice of the chemist, that would not be practising medicine. Nor if one went to a chemist and druggist and asked him which of two named compounds was considered the better medicine, would such information be practising medicine? I think a chemist and drug-

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gist may sell drugs or the compounds which he has, by telling intending purchasers their qualities or properties, and commend his goods as being fit for the purposes for which they are intended, and he may tell which is the better or the best of those he is selling. If the purchaser takes upon himself the responsibility of determining the symptoms of his own case, and judging from such symptoms what trouble he is suffering from and the medicine he requires to relieve him from such suffering, he is not asking the chemist and druggist to advise him as to his ailments or troubles; nor is he asking him to perform the duties which he might call upon his physician to do. A line, it seems to me, must be drawn between advising as to a remedy necessary for a disease, which the chemist or druggist assumes that he has discovered by enquiry from the purchaser as to the symptoms, and advising between different remedies for a complaint, which the intending purchaser informs the druggist he is troubled with. It is difficult to formulate, and I fear to confuse my meaning by attempting to define, but I venture to say, hoping that I may not be misunderstood, that a chemist or druggist is not entitled to ascertain from intending purchasers the symptoms and determine from them the disease, and prescribe a remedy; but he may, if the purchaser tells him his complaint and asks for a remedy, inform him what remedies he has for such complaint; and also inform him which, in his opinion, is the better or best remedy, leaving the purchaser to exercise his own judgment as to which of these preparations he may purchase.

Perhaps on the whole it would be better, without further attempting to define what practising medicine may be, to say that in this case, there was evidence upon which a magistrate might well find that the defendant was practising medicine for gain contrary to the provisions of the statute.

I think the motion must be dismissed with costs.

GALT, C. J., concurred.

G. F. H.

[COMMON PLEAS DIVISION.]

PAGE V. DEFOE.

BROWN V. DEFOE.

ASHDOWN V. DEFOE.

Bailment—Warehouseman—Bailee for Hire—Collapse of Warehouse through Undiscovered Defect—Dry Rot—Liability.

A building erected for a billiard table manufactory, was converted into a warehouse and used as such for about nine months when the rear portion of it collapsed through the breaking of a beam supporting the ground floor occasioned by dry rot in one of the beams, and a quantity of goods stored therein was damaged. No negligence was shewn in the construction of the building or the selection of the material used therein, or in not discovering the existence of the dry rot, and except therefor the building would have been capable of sustaining the weight put on it, as the front portion with a greater weight in it remained intact.

In an action for the damages sustained to the goods warehoused in the building :—

Held, that the defendant was not liable.

THESE three cases were tried together before MACMAHON, Statement.
J., and a jury, at Toronto, at the Autumn Assizes, 1892.

They were also argued together.

The evidence at the trial was confined to the case of *Brown v. Defoe*.

The action was against the defendant as a warehouseman, the claim being "that the warehouse was an old building not intended at the time of its erection to be used as a warehouse, and not sufficiently strong nor otherwise adapted for that use, of all which facts the defendant was or ought to have been aware."

In the warehouse certain goods of the plaintiff were stored, which were damaged by the fall of the rear portion of the building.

The evidence, so far as material, is set out in the judgments.

At the trial questions were submitted to the jury, which, with the answers thereto, were as follows:

1. Was there reasonable care exercised in the construction of the building? A. Yes.

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2. Was there reasonable care exercised in converting the building for the purpose of a warehouse? A. No.

3. Was care exercised in selecting the material when it was originally put into the building? A. Yes, reasonable care

4. What was the defect which caused the collapse of the building? A. Unsound timber and not sufficient strength in structure.

5. If you find the collapse was caused by any insufficiency of the material, in what did the insufficiency consist? A. Too long a span, light timber, unsound timber.

6. If you find it was from an insufficiency in the material, was there negligence in not discovering that such insufficiency existed at the time when the building was converted into a warehouse? A. Yes.

On these findings, the learned Judge entered a verdict in each of the cases for the plaintiff.

The defendant moved, on notice, in each of the cases, to set aside the judgment for the plaintiff and enter judgment for the defendant.

In Hilary Sittings, 1893, before the Divisional Court, composed of GALT, C. J., and ROSE, J., *W. R. Meredith, Q.C.*, supported the motion. In order to maintain an action of this kind, it must be proved that the defendant was guilty of negligence. No negligence was proved here. In *Searle v. Laverick*, L. R. 9 Q. B. 122, it is laid down that all a bailee has to do is to take reasonable care of the goods entrusted to him, involving an obligation that the building in which the goods are deposited is in a proper state, so that the goods may be reasonably safe in it. See also, *Coggs v. Bernard*, 2 Ld. Raym. 917-8. The evidence shews that reasonable care was exercised in the erection of the building and in the selection of the material used in its construction. The defendant here did everything that a reasonable man would do before the building was converted into a warehouse. He had it examined and, apparently, it was perfectly safe. The cause of the collapse of

the building was dry rot in one of the beams, which the defendant had no means of discovering; and had it not been for the existence of the dry rot in the beam, the floors which collapsed would have been capable of sustaining a very much greater weight than was put upon them, and in fact the floors of the front part of the building, which did not fall, sustained a very much greater weight than the rear portion, where the collapse took place. Under the circumstances, there can be no liability imposed upon the defendant. Argument.

A. C. Macdonald, H. E. Irwin and W. H. Blake shewed cause for the respective plaintiffs. The second question is the one which covers this case, namely: that proper care was not taken when the building was converted; the real cause being the defective packing of the beams. The evidence shews that the building was faulty in construction. The learned Judge at the trial had the case of *Searle v. Laverick*, L. R. 9 Q. B. 122, before him, and founded the questions to the jury upon it. There is a marked difference between that case and this. In that case a competent architect was employed and everything done to insure the proper construction of the building; while here the plaintiff acted as his own architect: also, in *Searle v. Laverick*, the building collapsed by reason of a high wind; while here it collapsed by reason of its own inherent weakness. There is the further distinction that the building here was not built for the purpose of being used as a warehouse, but as a billiard manufactory, and the *onus* was on the defendant to shew, when he changed the character of the building, that he had used every care to see that it was capable of sustaining the weight which was to be placed in it. The defendant has failed to shew that he exercised due care: *Edwards on Bailments*, 3rd ed., p. 261, sec. 344; *Edwards v. Hallinder*, Popham 46; *Schwerin v. McKie*, 51 N. Y. 180; *Addison on Contracts*, 9th ed., 824; *Cairns v. Robins*, 8 M. & W. 258; *Pickard v. Smith*, 10 C. B. N. S. 470; *Goodman v. Boycott*, 2 B. & S. 1; *Burnell v. New York Central R. W. Co.*, 45 N. Y. 184; *Bank of Oswego v. Doyle*, 91

Argument. N. Y. 32; *Stewart v. Stone*, 127 N. Y. 500, 506; *Hyman v. Nye*, 6 Q. B. D. 685.

Meredith, Q.C., in reply. The defendant did employ a competent person to inspect the building, who made his report as to what was necessary to be done, and this was carried out. There was clearly no fault on the part of the defendant.

January 6, 1894. GALT, C. J. :—

The facts may be briefly stated as follows: The building was erected nine or ten years ago. It was originally intended for a billiard table factory, and, according to the undisputed evidence, it was properly adapted for that purpose. The building ran north and south. It was about 111 feet in length by 28 feet in width in the inside. There was a beam ten by twelve inches running from north to south. This was supported on cedar posts, with the exception of the front sixty-one feet of the first floor, which had iron posts. There were four storeys, the floor of each was supported in the same manner except that on the upper floor the beam was not as large and the posts were smaller. The joists consisted of planks twelve by two, which were broken at the centre and rested on the beam, and at each end on a projection in the wall, except every fifth joist which extended the full width, the posts on which the beam rested were about sixteen feet apart. The building used to be occupied as a billiard table factory in 1891, and was used as a warehouse in June, 1891.

The collapse, which is the cause of this action, occurred on the night of 18th April, 1892.

The building was on the ground floor divided, that is to say, there was a hoist situated sixty feet from the north. The whole of the floor did not collapse; the part that did was the fifty-one feet south of the hoist.

The cause of the collapse was the breaking of the beam supporting the ground floor. This is the opinion of all the witnesses; and, moreover, is, in my opinion, established by

the fact that the debris occasioned by the collapse was in a V form. It is manifest also from the findings of the jury, this was the opinion formed by them, for in fact the questions submitted and the answers can have no reference to any other cause as the walls were uninjured and the northern sixty feet remained uninjured.

The whole question then turns on the point whether the defendant was guilty of such negligence in using a beam of such dimensions as would render him responsible as a warehouseman. I will refer to the law presently.

[The learned Chief Justice then considered the evidence of the plaintiff's witnesses, which was to the effect that the accident happened through the breaking of the beam on the ground floor, some of the witnesses thinking that the posts had been placed too far apart—others that they had not—and continued :]

Upon this evidence the plaintiff closed his case, on which a nonsuit was moved for; but the learned Judge decided to hear the evidence for the defence.

The first witness was the defendant. He stated he had had experience in purchasing timber: that he had carefully inspected all the timber before it was placed in the building.

Webster, the builder, who had done the carpentering, also proved that the timber was, in his opinion, sound; and the jury have found, in answer to the third question, that reasonable care was exercised in selecting the material.

It was then proved that after the collapse portions of the beam that had broken were affected with what is termed "dry rot." This was undisputed. Then what is "dry rot"? "Dry rot," according to Webster, is "a rapid decay of timber by which its substance is converted into a dry powder." Then in the Century Dictionary, "a decay affecting timber, * * destroying it." * *

It appears that dry rot is what may be termed a concealed defect; it attacks the centre not the outside of the timber; moreover, in the present case, the beams were white-washed, so there was no possibility of the defendant being aware of the defect.

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Galt, C.J.

Judgment.

Galt, C.J.

The building had been occupied for eight years as a billiard table factory; and, although it is true the floors were not subject to the same weight as when it was used as a warehouse, there must have been considerable pressure. After this time it was occupied for the space of at least nine months as a warehouse.

Then as respects the size of the beam. It is manifest it was sufficient because the northern portion of the warehouse, which was supported by the same beam, and in which twice the quantity of flour was stored remained standing. It is therefore evident it was dry rot in the southern portion which destroyed the beam and occasioned the collapse.

The law, as respects the liability of warehousemen, is fully discussed in *Searle v. Laverick*, L. R. 9 Q. B. 122.

The judgment of the full Court was given by Blackburn, J., in giving judgment he says, "the obligation to take reasonable care of the thing intrusted to a bailee of this class involves in it an obligation to take reasonable care that any building in which it is deposited is in a proper state so that the thing therein deposited may be reasonably safe in it." In concluding he says: "We must imply the warranty or allegation which would be reasonable in the ordinary state of things, and no more."

Applying this rule to the present case. The collapse arose from the breaking of a beam. It was proved such breakage occurred through dry rot which was unknown to the defendant, and of which he could not by reasonable care have ascertained the existence.

The defendant is entitled in each of these cases to judgment dismissing the actions as against him with costs.

ROSE, J. :—

If the result was caused by the breaking of the timber by reason of dry rot, then I think we must exclude from consideration any question as to structural defect, for such defect was not the cause or a cause.

Then, was there negligence in not discovering the dry rot? There was no negligence in the erection of the building nor in selecting the material therefor.

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No witness has said that it was good practice required at the hand of any competent builder to examine for dry rot at the time when the change was made in the building. The defendant expressly says that it was not a duty. Any finding of negligence based upon the existence of such a duty was not only without evidence to support it, but against evidence. See also the evidence of the witness Webster.

The jury having adopted the theory of unsoundness, which, on the evidence, must mean dry rot, their further finding of structural defect does not assist the plaintiffs; and there being no evidence to support a finding of negligence in not examining for dry rot at the time when the changes were made in the building, I agree that on the whole case there must be judgment for the defendant in each action, dismissing the action with costs.

G. F. H.

[COMMON PLEAS DIVISION.]

GORDON V. DENISON AND STEPHEN.

Trespass—Police Magistrate—Jurisdiction—Warrant to Compel Attendances of Witnesses—R. S. C. ch. 174, sec. 62—Arrest—Imprisonment—Excess—Damages.

The plaintiff, a barrister, having been subpoenaed to give evidence for the prosecution in a criminal case before a police magistrate, attended at the time named ; but, on the case being adjourned, did not then attend and the case was further adjourned ; the prosecutor forthwith laid an information on oath before the magistrate, that the witness was a material one, and that it was probable he would not attend to give evidence ; upon which the magistrate issued a warrant under sec. 62, R. S. C. ch. 174, addressed to the chief constable or other police officers, etc., and to the keeper of the common jail of the county and city, directing them to bring the witness before him on the date of the adjournment, some five days distant. The witness was forthwith arrested by two police officers and brought to the office of one of the police inspectors, and on his refusing to answer the questions usually put to criminals, except those as to his name and address, the inspector ordered him to be searched, which was done, and his personal property and private memorandum book were taken from him, the latter being opened and read by the inspector. He was then taken to the cells where he remained some twenty minutes, when he was brought before the magistrate, and on his giving his personal undertaking to appear on the day named, he was liberated. In an action against the police magistrate and the police inspector :—

Held, as to the magistrate, reversing the judgment of ROSE, J., at the trial, that having jurisdiction by virtue of sec. 62 of R. S. C. ch. 174, to issue the warrant, he incurred no liability even though he might have erred as to the sufficiency of the evidence brought before him, and on which he acted.

As to the liability of the inspector the Court was evenly divided, GALT, C. J., being of opinion that his acts, however unreasonable, were done in the execution of his office, and that under sub-sec. 2 of sec. 1, R. S. O. ch. 73, he was protected. MACMAHON, J., agreeing with ROSE, J., at the trial, was of opinion that there being no authority in the warrant to search and confine, he could not justify thereunder for the excess.

Quære, whether section 62 authorizes the issue of the warrant or its enforcement an unreasonable length of time before the day named for the attendance of the witness.

Statement.

THIS was an action brought against the defendant George Denison, the police magistrate of the city of Toronto, and inspector Stephen of the Toronto police force.

The charges set up against the defendant Denison in the statement of claim, were :

1. That on the 16th October, 1891, he wrongfully, improperly, and unlawfully assumed to issue process of the police court of the city of Toronto, and to cause the plain-

tiff to be assaulted and arrested, and to be wrongfully and falsely imprisoned. Statement.

2. That on the 26th October, 1891, the defendant wrongfully and improperly, and in excess of his jurisdiction, caused the plaintiff to be brought before him and to be held to bail in the penal sum of \$100 to appear and give evidence in a certain prosecution then pending before him.

3. That on 16th October, the defendant by a warrant under his hand and seal unlawfully, and in excess of his jurisdiction as police magistrate, caused the plaintiff to be arrested, etc.

4. That the said warrant was issued by the defendant without evidence on oath or affirmation of any credible witness that the said plaintiff was likely to be able to give material evidence.

The charges against the defendant Stephen were :

6. The said defendant James Stephen wrongfully, improperly and unlawfully, and without sufficient warrant or authority, did assault the plaintiff and caused him to be imprisoned in No. 1 police station in the said city of Toronto, and did assault the plaintiff, and by force and violence did deprive the plaintiff of certain moneys and property to him belonging and being in his possession and upon his person when he was brought to the said police station, viz., one dollar and fifty cents, and one gold watch and chain.

The 7th clause was as follows:—

7. And the plaintiff repeats the allegations hereinbefore stated further in respect of each of the defendants above named, further saying that the said acts of the said defendants were done and committed unlawfully and maliciously and without reasonable and probable cause.

The defendants pleaded the general issue by statute.

The statutes referred to by the defendant Denison were : R. S. C. ch. 144, sec. 1, a Public Act ; R. S. C. ch. 174, secs. 27, 58, 60, 61, 62, 75, 81, 211, 278, a Public Act ; R. S. O. [1887], ch. 89, sec. 9, a Public Act ; R. S. O. [1887], ch. 73, secs. 1, 9, 13, 14, 15, 20, 21, 23, a Public Act.

Statement

The statutes referred to by the defendant Stephen were : R. S. O. [1887], ch. 73, secs. 1, 13, 14, 15, 20, a Public Act ; 24 Geo. II., ch. 44, sec. 6 (Imp.), a Public Act.

The action was tried before ROSE, J., and a jury, at Toronto, on the 16th January, 1893.

The facts fully appear in the judgments :

At the close of the plaintiff's case a nonsuit was moved for, which was renewed at the close of the evidence. The learned Judge reserved judgment on the motion.

Questions were submitted to the jury which, with their answers, were as follows :

1. Was the defendant the magistrate, actuated by any improper or indirect motive in granting the warrant in question ? A. We think not.

2. Did the defendant the magistrate, act reasonably with care and due consideration, or with haste and inconsiderately, in granting the warrant ? A. With haste.

3. Or was the defendant the magistrate, acting in the supposed performance of the duties of his office, and in good faith to enforce the attendance of a person he believed likely to give material evidence for the prosecution, and that probably would not attend to give evidence unless compelled to do so ? A. No.

4. Were such facts and circumstances brought to the knowledge of the magistrate as made it reasonable for him to believe that the person was such a person ? A. No.

5. Was the arrest on the 16th for the purpose of giving evidence on the 21st necessary or reasonable ? A. It was not necessary or reasonable.

6. What damages do you find reasonable to be paid by the magistrate for the arrest under the warrant, and also for the treatment of the plaintiff after his arrest ; find separately as to each ? A. (1) \$1,000 ; (2) \$500.

As to the inspector :

1. In directing the examination, search and imprisonment, or any one of the three, was the inspector actuated by any indirect motive or improper motive ? A. Yes.

2. Or was he acting in good faith in the supposed performance of the duties of his office? A. No. Statement.

3. Did such facts appear as made it reasonable for the inspector to so believe? A. No.

4. Was it necessary or reasonable, under the circumstances, for the inspector to order the examination, search and imprisonment, or any of them? A. It was unnecessary and most unreasonable.

5. What damages do you find reasonable to be paid by the inspector for the examination, search and imprisonment? A. \$500.

April 14, 1893. ROSE, J. :—

This was an action brought against the police magistrate of the city of Toronto, and inspector Stephen of the police force, for arrest and imprisonment and search of the plaintiff's person after arrest.

The statement of claim is framed to meet the requirements of sections 1 and 2 of R. S. O. 1887, ch. 73.

The plaintiff was a practising barrister and solicitor in the city of Toronto, and was summoned to attend the police court in a matter then pending before the police magistrate, and did attend on one or more occasions when the matter was adjourned until the 16th of October, and the case then coming on the plaintiff was not present. The subpoena required his attendance on the 9th October, "and so on from day to day until the said matter shall be finally heard and determined." The question was raised as to whether under this subpoena the plaintiff was required to attend from day to day, or whether it was necessary to issue a fresh subpoena upon each adjournment.

It will not be necessary in the view I take of this case to decide this question for the witness was not proceeded against for any alleged contempt. Reference may be had to *Barber v. Wood*, 2 M. & Rob. 172; *Patterson on the Liberty of the Subject*, vol. 1, p. 465, and the cases there referred to.

Judgment.

Rose, J.

On the 16th of October, the informant in the case pending before the magistrate, one St. Denis, appeared before the magistrate and swore to what is called an "Information and Complaint" in which St. Denis stated on oath on information and belief that one Charles Chamberlin had been guilty of false pretences as therein set out; and, further, "that one G. B. Gordon, of the said city of Toronto, is likely to give material evidence on behalf of the prosecution in this matter, and it is probable that the said G. B. Gordon will not attend to give evidence without being compelled so to do against the form of the statute in such case made and provided. Complainant prays that a warrant may issue and justice be done in the premises."

On this information or deposition the police magistrate granted a warrant which he signed, addressed "To the chief constable, or other police officers of the said city of Toronto, and to any constable in and for the said county of York, and to the keeper of the common jail of the said county of York and city of Toronto." In this is recited the information as to the false pretences, and further as follows: "And it having been made to appear to me upon oath that G. B. Gordon of the city of Toronto, in the said county of York, is likely to give material evidence on behalf of the prosecution in this matter, and it is probable that the said G. B. Gordon will not attend to give evidence without being compelled to do so, etc." The warrant then commanded the parties to whom it was addressed "to bring and have the said G. B. Gordon on the 21st day of October, at 10 o'clock in the forenoon, at the police court, before the police magistrate, to testify concerning the matter." The warrant was dated the 16th October.

At the time of the issue of the warrant the plaintiff was attending to his duties as counsel in a case in which he was engaged at Osgoode Hall. Upon reaching his office two detectives appeared, produced the warrant, arrested him, took him to the police court office on Court street, where he was taken into the room of the defendant inspector Stephen. There he was interrogated as to his

age, residence, and certain other matters concerning his life, for the purpose of preserving a record as in the case of criminals. To these the plaintiff gave answers as to his name and address, but refused to make further answer, when the defendant Stephen, apparently irritated, asked if he had been brought there under a warrant, and upon being told he had, directed him to be searched. His person then was searched, his pockets emptied, the contents examined by Stephen who opened and looked through the plaintiff's note book. The articles were restored to the plaintiff and he was then taken to the cells. After being imprisoned for about twenty minutes, the police magistrate being in his room, the plaintiff was taken before him and discharged upon entering into a recognizance to appear to give evidence on the 21st.

Judgment.

Rose, J.

The warrant was issued under sec. 62 of R. S. C., ch. 174, and recites as follows:—"If the Justice is satisfied by evidence upon oath or affirmation that it is probable the person will not attend to give evidence unless compelled so to do, then instead of issuing such summons the justice may issue his warrant (L. 3) in the first instance, and the warrant if necessary may be backed as aforesaid."

The case came on for trial before me at the Sittings at Toronto, on the 16th of January last, when, upon the close of the evidence, I announced that I should leave certain questions to be answered by the jury to which counsel for the defendants objected, desiring a general verdict. I stated that I would leave the questions, and upon receiving the answers should then give the jury directions as to the law upon their findings of fact, ruling as to reasonable and probable cause, etc., and should then, if the counsel desired it, take a general verdict upon such ruling or directions. Counsel for the plaintiff, as I understood it, assented to this, but if I remember correctly, the counsel for the defendants did not assent, but on the contrary claimed a right to have a general verdict, without question and answer. Upon the return of the jury to the court room with the answers to the questions—through an oversight on my part, which was

Judgment.

Rose, J.

not detected by counsel for the plaintiff, and which, may be, was not observed by counsel for the defendant, although as to this I cannot say—a general verdict was not asked for, and the jury separated before it occurred to me that I had not done as I stated I would do. I then offered to have a new jury sworn on the following morning, and the case retried if counsel for the plaintiff desired, unless counsel for the defendants would consent to allow judgment to be entered upon the findings. Counsel for the defendants declined to take any position which would be a waiver of any rights or any advantage that they deemed they had gained by reason of what had occurred, and counsel for the plaintiff thought it best to let the case rest as it was, taking the chances of the Court having power to enter a verdict upon the findings.

At the close of the plaintiff's case there was a motion for nonsuit, which motion was renewed at the close of the evidence. I reserved judgment upon the motion which I have now to consider as well as the motion to enter judgment upon the findings.

It was argued before me that the information or deposition, to which I have referred, was not evidence upon oath or affirmation, and that it was necessary that the magistrate should hear the deponent give his evidence as is usual in courts of justice in the witness box after having been duly sworn.

I do not think that objection is well taken. I do not see that a deposition or information taken before the magistrate is not evidence upon oath or affirmation. In this case the deponent made his statement, which was taken down and sworn to before the magistrate. How it would be if the deposition or affidavit were made before another and presented to the magistrate, I do not say. I express no opinion one way or the other.

There is, however, a much more serious question, as it seems to me, viz., whether or not the deposition or information disclosed any evidence? It is manifest that it was intended that the justice should have evidence, that is,

statements of fact, upon which he could determine and be satisfied as to whether it was probable the witness would not attend to give evidence unless compelled so to do. In this case, all that is stated is, that in the opinion of the informant the plaintiff would not attend to give evidence.

Judgment.

Rose, J.

In Mr. Best's work on Evidence, 8th ed., at p. 6, par. 11, it is stated: "The word 'evidence' signifies in its original sense, the state of being evident, *i. e.*, plain, apparent, or notorious. But by an almost peculiar inflection of our language, it is applied to that which tends to render evident or to generate proof. This is the sense in which it is commonly used in our law books, and will be used throughout this work. Evidence, thus understood, has been well defined,—any matter of fact, the effect, tendency, or design of which is to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact. The fact sought to be proved, is termed the 'principal fact.' The fact which tends to establish it, the 'evidentiary fact.'" At page 465 of the same vol., par. 511, the rule is laid down as to opinion evidence not being receivable. The learned author states: "The use of witnesses being to inform the tribunal respecting *facts*, their *opinions* are not in general receivable as evidence. This rule is necessary to prevent the other rules of evidence being practically nullified. Vain would it be for the law to constitute the jury the triers of disputed facts, to reject derivative evidence when original proof is withheld, and to declare that a party is not to be prejudiced by the words or acts of others with whom he is unconnected, if tribunals might be swayed by opinions relative to those facts, expressed by persons who come before them in the character of witnesses. If the opinions thus offered are founded on no evidence, or on illegal evidence, they ought not to be listened to; if founded on legal evidence, that evidence ought to be laid before the jury, whom the law presumes to be at least as capable as the witnesses of drawing from them any inferences that justice may require."

In *The Queen v. Inhabitants of High Bickington*, 1

Judgment. D. & M. 103, it is said: "It is not sufficient evidence to
Rose, J. ground the removal of a pauper, if the pauper, or other witnesses, state in the examinations that the pauper is chargeable to the removing parish; chargeability being a conclusion of law to be inferred by the justices from the evidence of the pauper's having received relief from the parish."

Lord Denman, C. J., said, at p. 105: "It appears to me that the removing magistrates have received as evidence an assertion of that which is properly a conclusion of law from evidence. If the witnesses had stated the fact of relief having been administered to the pauper by the removing parish, the justices would then have been in a position to draw the inference that the pauper was chargeable to it. As it is, the witnesses have stated the inference instead of the facts which led to it."

It seems to me to be clear that the police magistrate in this case accepted the opinion of the informant upon facts which were not stated to himself. He, the magistrate, was to be satisfied by evidence. It was not the informant that was to be satisfied by evidence. It may be that the facts which appeared to the informant were not evidence, or if evidence, would not have satisfied the magistrate. I am, therefore, clearly of the opinion, that the magistrate had no evidence before him upon which to form an opinion, and therefore had no jurisdiction to issue the warrant. See as to delegating judicial functions *Wright v. Collier*, 19 A. R., 208. If I am correct in this view, then the defendant Denison was guilty of trespass: *Cross v. Wilcox*, 39 U. C. R. 187; *Connors v. Darling*, 23 U. C. R. 541, and other cases cited in *Cross v. Wilcox*.

The plaintiff having been arrested upon such warrant and brought before the magistrate, and having been required to enter into a recognizance before being released, it seems to me clear that the magistrate is liable in an action of trespass for such damages as may be properly awarded. See also *Jones v. Grace*, 17 O. R. 681.

Nor was it necessary to set aside the warrant before

bringing the action. There, therefore, can be no nonsuit as to the defendant Denison.

Judgment.

Rose, J.

As to the defendant Stephen, in addition to the questions to be hereafter considered, there was evidence to be submitted to the jury that in directing the plaintiff to be searched and placed in the cells, he was actuated not by any desire to discharge his duty, but rather by a desire to punish the plaintiff for what he considered an impertinent or irritating refusal to answer the questions which were being put to him. No doubt the plaintiff used language which was calculated to irritate the inspector. Under the circumstances of the case irritation on the part of the plaintiff was probably natural and justifiable.

There is also a question to be considered as to whether or not under such a warrant a constable has the right to take a witness into custody at a time unreasonably long prior to the day named in the warrant when he is to be brought before the magistrate. Whether in fact the warrant in its terms does more than direct the constable who may act under it, to bring the witness before the magistrate to give evidence, and whether or not he is justified in depriving the person named in the warrant of his liberty any longer than is necessary for the purpose of obeying the warrant, and whether under such warrant the person named when taken can be considered a prisoner in the ordinary sense of the term amenable to such prison regulations as may be adopted, including the search of the person and the contents of the pockets in the clothing of the person thus taken, or whether unnecessary acts such as undue detention or unnecessary search or indignities inflicted which are not called for, are not such acts as will render the persons guilty of them trespassers, are matters requiring grave consideration. See *Hamilton v. Massie*, 18 O. R. 585, and *Morris v. Wise*, 2 F. & F. 51.

But was not the defendant Stephen also a trespasser? Upon comparing the form of warrant under sec. 62, "L. 3," with the form "L. 4," to be used when a witness refuses to be sworn or give evidence, it is manifest that it was not

Judgment.

Rose, J.

contemplated that the power given by sec. 62 to issue a warrant to a constable "to bring and have" a person before a magistrate "to testify," included the power to commit to gaol—the warrant in such a case does not authorize a keeper of the common gaol to receive the party taken under such warrant as it does when he is arrested for contempt. See also other forms in the same statute.

There was no authority to direct this warrant to the keeper of the gaol, and the warrant contains no direction to the gaoler to receive the plaintiff into his custody. The plaintiff was not a criminal, either felon or misdemeanant; he had committed no crime or offence, and was not even adjudged guilty of a contempt, but was merely a person whose evidence was required, and for whom it was considered necessary to send a constable to "bring and have" him before the magistrate. Whatever restraint upon personal liberty was necessary to enforce such warrant, the constable was justified in exercising, but no more, and for any excess he would, on the authority of the above cases of *Hamilton v. Massie*, and *Morris v. Wise*, be liable as a trespasser. If the fair reading of the warrant required the constable to arrest the plaintiff on the 16th and hold him in custody until the 21st, then, in my opinion, the magistrate was not justified in issuing it on the 16th. If it did not require the constable to whom it was directed to act on the 16th, but only a reasonable time before the sitting of the Court on the 21st, and such, in my opinion, was the direction therein contained, then the constables were not justified in arresting the plaintiff on the 16th to bring and have him before the magistrate on the 21st. If the constables on the 21st had gone to the plaintiff's office to bring and have him on that day before the magistrate, they would not have been justified before bringing him before the magistrate in taking him before inspector Stephen for interrogation and search of his person. Such an act would clearly in this case have been unnecessary and unjustifiable, and the fact that they unnecessarily arrested the plaintiff on the 16th, would of course, not give any greater justification.

But, apart from these considerations which probably would be for the jury, I am of opinion that there was no necessity for any interference by the inspector at all ; the warrant did not direct him to either examine or search the plaintiff. He was not one of the constables arresting the plaintiff for the purpose of bringing and having him before the magistrate on the 21st, and although one of the constables to whom the warrant was directed, what he did was not necessary for the purpose of executing it. I know of no law rendering a person whose presence is required as a witness liable to prison regulations as a criminal. As to the right to search the person of felons, see *Hoover v. Craig*, 12 A. R. 72, at p. 77, and the authorities there cited ; also *Dillon v. O'Brien*, 16 Cox C. C. (Ir.) 245, where there is an interesting discussion as to the right to seize property required as evidence ; also *Tyler v. London and South-Western R. W. Co.*, 1 Cab. & El. 285.

Judgment.

Rose, J.

An attempt was made at the trial to justify such treatment by proof of a custom. Even if proven, it, in my opinion, shews no defence in law ; the multiplying of cases where unjustifiable acts have been committed, cannot afford a justification for the doing of the one complained of, even if the others have been submitted to without complaint. Even in cases of criminals the law is not cruel and unmerciful as is shewn by the authorities referred to ; and see Comyn's Dig., vol. 4, Imp. (I.); p. 478. If I am correct in the view I have expressed, then the defendant Stephen was not acting under the warrant at all, but was a trespasser. See cases above referred to, and *Crozier v. Cundey*, 6 B. & C. 232 ; 9 D. & R. 224, cited in Addison on Torts, 6th ed., sec. 719, under "Excess of Authority."

Then may the plaintiff have judgment entered as on a general verdict ? I am of opinion he may.

All the jury had to do, if there was no justification for the acts done, was to assess the damages, and this they have done—the fact that such assessment was by answers in writing to written questions can make no difference.

Moreover, have not all questions in this case which

Judgment.

Rose, J.

might heretofore have been tried by a jury been tried by a jury as required by sec. 76 O. J. A., R. S. O. ch. 44, 1887? I have really followed the course adopted by Byles, J., in *Morris v. Wise*, save that I assisted the jury by giving them the questions in writing. Unless the fair reading of the judgment in *Hamilton v. Cousineau*, 19 A. R. 203, and *McLaren v. Archibald* (unreported), (a) places such a construction on sections 83 and 84 as forbids the entering of judgment after questions have been answered, without going through the meaningless form of advising the jury what their verdict must be on such findings as they have made, no question should arise as to the plaintiff's right to have judgment entered.

But without expressing any opinion where there are questions of fact to be determined prior to the entry of judgment, I am of opinion that when no defence in law is disclosed on the evidence, and the sole duty of the jury is to assess the damages, such assessment is in form and effect a general verdict.

The defendant Denison is not responsible for the examination and search of the plaintiff, although probably he is for the imprisonment in the cells: *Cave v. Mountain*, 1 M. & G. 257; *Hamilton v. Massie*, 18 O. R. 588. On the division of the damages by the jury I can only direct judgment against him for \$1,000, of which he cannot complain if the plaintiff do not. There will be judgment against the defendant Stephen for \$500.

I have not found it necessary to consider the plaintiff's argument that the warrant was void because addressed to the gaoler. For this was cited: *Re Nesbitt*, 1 New Sess. Cas. 366.

The defendants moved on notice to set aside the judgment entered for the plaintiff, and to have the judgment entered in their favour.

In Michaelmas Sittings, November 28th, 1893, before a Divisional Court, composed of GALT, C. J., and MACMAHON,

(a) Since reported 21 S. C. R. 588.

J., *Delamere*, Q. C., and *Macklem*, supported the motion on behalf of the defendant Denison. The defendant was not guilty of trespass. He had jurisdiction to make the order for the warrant. The Procedure in Criminal Cases Act, R. S. C. ch. 174, provides that where a person summoned, neglects or refuses to appear as a witness, the magistrate may issue his warrant; and section 62 provides where the justice is satisfied by evidence on oath that the witness will not attend he may issue his warrant in the first instance. The plaintiff having neglected to appear on the summons issued, the magistrate might have issued a warrant under section 61, but as a matter of precaution he required the affidavit provided for by section 62, and therefore, even assuming that the affidavit is insufficient, the magistrate had jurisdiction to act without it: *Read v. Hunter*, 8 C. L. T. 428. The affidavit, however, is sufficient. It is the affidavit given in all the text books: Oke's Magisterial Formulist, 7th ed., p. 303; Oke's Magisterial Synopsis, 14th ed., 727-8; Saunder's Magistrates Courts, 5th ed., 58. The only distinction is, that in Oke the words used are: I "verily believe" that the witness will not attend, while here the words used were: "It is probable" that the witness will not attend, which are substantially the same, *i. e.*, they are both stating merely the opinion of the informant. It is also the form which has always been used in the police court before the appointment of the defendant as police magistrate. The learned Judge seemed to think that the information was not sufficient, that the magistrate should not have been satisfied with the opinion of the informant, but should have satisfied himself from evidence placed before him that the witness would not attend. The evidence was placed before him as the information was taken before him. Informations are always given on information and belief, and in all such cases opinion evidence is properly receivable. It is for the magistrate to decide whether the evidence is sufficient. He exercises a judicial function, and not a ministerial one, and when he is satisfied

Argument.

Argument. and decides on the sufficiency of the evidence, even if he be wrong, he will not be liable as a trespasser: Taylor on Evidence, vol. 2, Black. ed., sec. 1416. Perjury can be laid on opinion evidence even though the evidence is inadmissible. The form of the warrant used is according to the form L. 3, given in the schedule. Trespass, therefore, will not lie. The cases relied on by the Judge at the trial are cases of quashing convictions, which is a very different thing from holding a magistrate liable in trespass. The only action that would lie would be an action on the case for malicious arrest, when want of reasonable and probable cause and malice must be alleged and proved: *Johnston v. Meldon*, Ir. L. R. 30 Q. B. 15. There was clearly reasonable and probable cause. The information was drawn up and presented by the County Attorney, who is bound to advise the magistrate. The question of reasonable and probable cause is for the Judge, and although he may put subsidiary questions to the jury, he must decide the question himself. The Judge should have found that there was reasonable and probable cause. This would have put an end to the case, for the jury have found there was no malice: *Cave v. Mountain*, 1 M. & G. 257; *Pease v. Chaytor*, 1 B. & S. 658, 673; *Calder v. Halket*, 3 Moo. P. C. 78; *Crawford v. Beattie*, 39 U. C. R. 13; *Dickson v. Crabb*, 24 U. C. R. 494; *McLellan v. McKinnon*, 1 O. R. 219; Stephen on Malicious Prosecution, 67; *McLaren v. Archibald*, 21 S. C. R. 588. The warrant also should have been quashed before action brought: R. S. O. ch. 73, sec. 21; *Graham v. McArthur*, 25 U. C. R. 478; *Sprung v. Anderson*, 23 C. P. 152; *Haacke v. Adamson*, 14 C. P. 201. Then as to the further ground of trespass alleged, namely, in causing the defendant to enter into a recognizance. No recognizance was in fact entered into, but on the plaintiff promising to appear he was allowed to go. The magistrate had power to require the plaintiff to enter into a recognizance. It is laid down that where a magistrate has power to order anything to be done he has authority to require a recognizance to be entered into

for the purpose of enforcing its being done : Dalton's Justice of the Peace, p. 137. This power arises not by reason of any statute, but is dependent on the common law. The courts have always attempted to protect magistrates when they have acted *bonâ fide*, so as to prevent them being hampered in the fearless administration of the law : *Johnston v. Meldon*, Ir. L. R. 30 Q. B. 15. The plaintiff expressly says that he was in no way damnified by the action of the magistrate.

Argument.

Herbert Mowat, for the defendant Stephen. The defendant desires, so far as they are applicable, to avail himself of the arguments addressed to the Court on behalf of the defendant Denison. The judgment appealed from cannot stand. 1. Because there is no verdict of the jury; and 2, the learned Judge should not have left any questions to the jury, the facts being undisputed. The learned Judge should have ruled on the question of reasonable and probable cause : O. J. Act, ch. 44, sec. 83 : *McLaren v. Archibald*, 21 S. C. R. 588 ; *Brown v. Hawkes*, [1891] 2 Q. B. 718. No action was maintainable against the defendant. No copy of the warrant was demanded as required by 24 Geo. II. ch. 44, sec. 6. The warrant also protected the defendant Stephen : *Regina v. King*, 18 O. R. 566 ; *Theobald v. Crichmore*, 1 B. & Al. 227 ; *Gosden v. Elphick*, 4 Ex. 445. The fact of searching the plaintiff cannot render the defendant liable. He was merely carrying out the rule of the police court in the case of all prisoners ; and the plaintiff admits, in the letter written by him to the papers that the defendant Stephen was not guilty of any malice.

Osler, Q. C., contra. The defendants have directed attention to sections 61 and 62, but not to section 60. These sections are taken from the Imperial Act 11 & 12 Vic. ch. 42, sec. 16. Section 60 provides that if it is made to appear to any justice by the oath or affirmation or any credible person, that any person in Canada is likely to give material evidence, etc., a summons may be issued. Then comes section 61 authorizing a warrant to be issued

Argument. on default of appearance to the summons. What the magistrate should have done was to have first issued a summons, as it is quite apparent that the information sworn to here was that required by section 60. When you come to look at section 62 you find a very different kind of information is required. Under that section it must be made to appear to the magistrate, and he must be satisfied by evidence, that the person required will not attend. The legislature have made a distinction which they must have had a reason for. The question is not that the person who lays the information should be satisfied, but that the magistrate should be satisfied. The same course must be adopted as at *nisi prius* when a witness does not attend on a subpoena. No case was presented under section 61 as for default in attending on a subpoena, for the plaintiff attended on the subpoena. It was therefore spent, and could have no validity on the adjournment; a new subpoena was necessary on each adjournment. The case must, therefore, rest as originating under section 62, and the whole question is, was the affidavit sufficient. Can it be said that there was any evidence on oath before the magistrate from which he could be satisfied? The authorities quoted by the learned trial Judge shew that the information is insufficient, and unless the Court affirm his judgment they will in effect be holding that there is no distinction between sections 60 and 62. The magistrate, therefore, acted without jurisdiction, and trespass lies against him: *Cross v. Wilcox*, 39 U. C. R. 187; *Ex p. Boyce*, 24 New Brunswick 347. The plaintiff does not require to rely on what took place when he was brought before the magistrate, but if necessary he can fairly urge that there was an illegal detention then. What took place before the magistrate amounted to a recognizance. It is not necessary that the record of recognizance should be drawn up at the time, it can be drawn up afterwards. The plaintiff is also entitled to recover for malicious prosecution. There was evidence of haste and want of deliberation from which it

might properly be determined that there was a want of reasonable and probable cause, and malice. It was not necessary to set aside the warrant before commencing the action, as it was not grounded on a judgment of conviction. Then as to the defendant Stephen. The Act of 24 Geo. II. ch. 44, sec. 6, does not apply ; it only applies where the constable is acting within his warrant. The warrant did not justify the bringing the plaintiff to the cells. All it authorized was to bring witness to testify on the 21st, and there is strong ground for the argument, that this would not justify an arrest before that date. Then when the plaintiff was brought before the inspector, he exceeds his duty in requiring the plaintiff to be searched, and taking everything from him, even his private book, which should be sacred, and also making the plaintiff undergo other indignities. This alone would justify the verdict against Stephens. It is no answer to say that this was the practice of the police court.

Delamere, Q.C., in reply. There is no distinction between the proof required by sections 60 and 62. The case of *Cross v. Wilcox*, 39 U. C. R. 187, is quite distinguishable. There the prosecutrix wished to withdraw, but the magistrate refused to allow her ; and in the case of *Ex p. Boyce*, 24 New Brunswick 347, the application was to quash a conviction, and not an action of trespass.

December 30, 1893. GALT, C. J. :—

This was an action tried before my brother Rose, in reality there are two actions, one against Denison as police magistrate of the city of Toronto, and the other against Stephen, an inspector of police. I propose to deal with them separately.

The statement of claim as against Denison contains four charges.

[The learned Chief Justice here set out the paragraphs of the statement of claim *ante* p. 576.]

The foregoing charges are in trespass ; but by the 7th

Judgment. clause "The plaintiff repeats the allegations hereinbefore
Galt, C.J. stated in respect of each of the defendants above named, further saying that the said acts of the said defendant were done and committed unlawfully and maliciously, and without reasonable and probable cause."

At the close of the case certain questions were submitted to the jury; but in the view I entertain it is only necessary to refer to the first, viz:

Was the defendant the magistrate actuated by any improper or indirect motive in granting the warrant in question? Answer.—We think not.

The facts of the case so far as they have reference to this fact may be briefly stated as follows:

There was an information before the police magistrate charging a certain person with fraud. A subpoena had been issued and served on the plaintiff requiring him to attend before the police magistrate to give evidence on 9th October. The plaintiff did attend, and the case was postponed until the 16th. When that day arrived the plaintiff was not in attendance, and the complainant made an affidavit stating, "it is probable that one G. B. Gordon of the said city of Toronto, is likely to give material evidence on behalf of the prosecution in this matter, and it is probable that the said G. B. Gordon will not attend to give evidence without being compelled so to do," etc.

Upon this affidavit, which was sworn before the police magistrate himself, the warrant was issued under which the plaintiff was arrested and brought before the magistrate. (I do not refer to what took place before he was brought before the magistrate, as it has no bearing on this case.) When he was brought before the magistrate the following took place as appears from his own evidence: "I told him of the indignities that I had been subjected to, and he remarked that that was the usual thing and could not be helped, but he said, 'The matter stands till the 21st, and I will admit you to bail.' 'Well,' I said, 'it will be a little awkward to get bail, and will you take my own bail?' He said 'yes.' He took my own bail in

\$100 to appear on 21st." In fact no bail was taken; the plaintiff gave his promise.

Judgment.

Galt, C.J.

The learned Judge having entered a verdict for the plaintiff for \$1,000 as found by the jury, this motion was made to set aside the judgment on various grounds.

The whole cause of action as appears from the statement of claim was the issue by the magistrate of a warrant to enforce the attendance of the plaintiff as a witness, and the taking of a recognizance. This was not done, so I do not refer to it.

By sec. 62 of R. S. C. ch. 174, "If the justice is satisfied by evidence upon oath or affirmation that it is probable the person will not attend to give evidence unless compelled so to do, then, instead of such summons (referring to the issuing a summons under section 60), the justice may issue his warrant in the first instance."

It is manifest from this section that the magistrate has jurisdiction to issue a warrant to enforce attendance of a witness.

By sec. 1 (1), R. S. O., ch. 73, "In case an action is brought against a police magistrate for any act done by him in the execution of his duty with respect to any matter within his jurisdiction, it shall be expressly alleged in the statement of claim that the act was done maliciously and without reasonable and probable cause; and if at the trial of the action the plaintiff fails to prove such allegation, he shall be nonsuited, or a verdict or judgment shall be given for the defendant."

If this statute is to afford any protection to justices of the peace, it must have reference to what may be termed irregularity in the discharge of his duties; that is to say, so long as he has jurisdiction he is protected for any act done by him in "the execution of his duty, unless it is proved to the satisfaction of a jury that the act complained of was done maliciously," etc.

The plaintiff in his own evidence in answer to the question: "Now, had you any idea that the police magistrate had any malice against you at this time? A. Before the

Judgment. 21st I saw no indication of it. You saw no indication of
Galt, C.J. it before the 21st; that is, before the time you were brought up—you know of no reason why he should have any malice against you. A. I know of none." This was after the warrant had been issued.

The jury have expressly found that "the magistrate was not actuated by any improper or indirect motive in granting the warrant in question," consequently, in my opinion, under the express words of the statute a "verdict shall be given for the defendant."

There was considerable discussion as to the findings of the jury upon which the learned Judge has entered a verdict.

It was contended that under section 84 of the Judicature Act the learned Judge had no authority to submit questions to the jury, and thereon to himself enter a verdict. That section is as follows: "Upon a trial by jury in any case except an action for libel, slander, criminal conversation, malicious arrest, malicious prosecution and false imprisonment, the Judge, instead of directing the jury to give either a general or a special verdict, may direct the jury to answer any questions of fact stated to them by the Judge for the purpose; and in such case the jury shall answer such questions, and shall not give any verdict, and on the finding of the jury upon the questions which they answer, the Judge shall direct judgment to be entered."

This was not an action for malicious prosecution. It is true that under the statute, where a charge is made against a magistrate for any act done by him in the execution of his duty it shall be alleged that the act was done maliciously, and without reasonable or probable cause; but this proviso is for the purpose of exonerating the magistrate unless he acted maliciously and without reasonable or probable cause; nor is it an action for "malicious arrest," as appears from the statement of claim, in which by the third section, to which I have referred, there is no allegation of malice; therefore the case does not come within the exception.

Then as respects the defendant Stephen.

Judgment.

Galt, C.J.

The charge against him is that "he wrongfully, improperly and unlawfully, and without sufficient warrant or authority, did assault the plaintiff, and caused him to be imprisoned at No. 1 police station, in the said city of Toronto, and did assault the plaintiff, and by force and violence did deprive the plaintiff of certain moneys and property to him belonging, and being in his possession and upon his person when he was brought to the said police station, viz., one dollar and fifty cents, and one watch and chain."

At the close of the case the following questions were submitted to the jury :

1. In directing the examination, search, and imprisonment, or any one of these, was the inspector actuated by any indirect or improper motive ? Yes.

2. Was he acting in good faith in the supposed performance of the duties of his office ? No.

3. Did such facts appear as made it reasonable for the inspector to so believe ? No.

4. Was it necessary or reasonable under the circumstances for the inspector to order the examination, search and imprisonment, or any of them ? It was most unnecessary and most unreasonable.

By sub-sec. 2 of sec. 1 of R. S. O. ch. 73. "So far as applicable the whole of this Act shall apply for the protection of every officer and person mentioned in the preceding subsection for anything done in the execution of his office as therein expressed. The officers therein referred to are "any officer or person fulfilling any public duty"; that is to say, in such action, "it must be alleged in the statement of claim that the act was done maliciously, and without reasonable and probable cause."

There can be, in my opinion, no question as to the acts, however unreasonable, being done in the execution of his office. The plaintiff was brought to the police court in custody under a warrant (the defendant had nothing to do with the issue of the warrant) directed to the chief

Judgment. constable or other police officer of the city of Toronto, to
Galt, C.J. "bring and have the plaintiff before the police magistrate," and the plaintiff had been arrested and brought to the police station, and placed in custody there under the warrant.

The following is a statement of what took place after he had been brought there:

[The learned Chief Justice then referred to the evidence of the plaintiff as to what took place at the police station, a summary of which is set out in the judgment of ROSE, J., *ante* p. 580, and continued:]

With this evidence before them it is not surprising the jury answered the questions in the manner they did; but this does not decide the case. There is a most important matter to be considered, viz., is there any evidence of malice?

The writ was issued on 23rd December, 1891. Before that time, viz., on 5th November, 1891, the plaintiff published in one of the newspapers in Toronto, the following statement which was produced at the trial:

Mr. Mowat.—I will ask him if this letter appeared in the "News."

Mr. Osler.—If he says it is all right I will not be technical.

Mr. Mowat. I will read you this letter:—"Colonel Denison's Bench Warrant:—I do not understand that the charges against inspector Stephen have been dismissed. The board, except Colonel Denison, certainly condemned the searching of the person as being wholly reprehensible, and on this point they have, as I understand, reserved their judgment; but on the other action of the inspector—the imprisonment I mean—they acquitted him of any officious and intentional wrong, because upon a statement he presented, supported by the approval of the military police magistrate who was present, admitting that during the last five years about fifty witnesses have been subjected to similar treatment. This appearing to be the unquestioned fact, the county Judge and the mayor very properly

held that the fault lay outside of the inspector's department.

Judgment.

Galt, C.J.

"The magistrate remarked at the session of the board, in extenuation of his action, that at the time he issued his warrant, he did not know it was the Gordon he knew. I told the Colonel then, and I tell the public now, that the grievance was not mine alone, and that I proceeded against the inspector solely to attack the system of tyranny against helpless people which our police authorities until now have supposed to be justifiable. I have no personal feeling against inspector Stephen. I may be permitted here to say that the county Judge said to me at the conclusion that I had done the board a service in bringing this state of things to their attention. G. B. Gordon. Toronto, November 4th, 1891."

That is the letter?

A. I think that is substantially the letter I wrote.

It is manifest from this that at this time the plaintiff made no accusation against the inspector for acting maliciously against him. What he called attention to was the harsh and improper manner in which persons were treated when brought to the police office in accordance with the established practice.

It is plain, therefore, that before an action can be sustained against the defendant it must be shewn that he acted "maliciously and without reasonable or probable cause."

Is there then any evidence that the defendant acted maliciously. In my opinion there is none. The plaintiff was a stranger to him; he could have had no possible cause of enmity against him. All that took place, as stated by the plaintiff himself, was that after he had had some discussion with one of the officers, the defendant interfered, and then the examination went on.

The plaintiff in his letter states, "admitting that during the last few years about fifty witnesses have been subjected to similar treatment. This appearing to be the unquestioned fact the county Judge and the mayor *very*

Judgment. *properly* held that the fault lay outside of the inspector's department. If this was the opinion of the plaintiff when he published the letter, I fail to see how he can now impute malice to the defendant.

Galt, C.J.

In the argument before us many cases were cited, but the whole subject of "malice" in cases of malicious prosecution may be considered as settled by the case of *Brown v. Hawkes*, [1891] 2 Q. B., 718. That was a case in which certain questions were submitted to the jury. The third was: Was or was not the defendant actuated by malice and indirect motives in the proceedings taken against the plaintiff? Answer, Yes. The case was tried before a County Judge who entered a verdict for the plaintiff.

The defendant appealed to the Queen's Bench Division, Cave, J., and Smith, J., and owing to difference of opinion, the appeal was dismissed. The defendant then appealed to the Court of Appeal.

The whole law on the subject of "malice" is fully discussed.

It is true that in that case the judgment was based on the findings of the jury in response to the other questions, viz.: First—Did the defendant take reasonable care to inform himself of the true facts of the case when he proceeded against the plaintiff? Answer. No. Did the defendant honestly believe in the full charge which he laid before the magistrate? Answer. Yes. It was on the last finding the judgment was based and the appeal allowed.

Lord Esher, in his judgment, states, at p. 726: "But, in an action for malicious prosecution, that is not enough to determine the case on" (referring to a want of reasonable and probable cause), "the plaintiff must go beyond that and shew that the defendant was actuated by malice."

In the present case there was no evidence that the defendant was actuated by malice, in fact the statement made by the plaintiff himself in his own letter, in my opinion, conclusively exonerates him. He states: "The

county Judge and the mayor very properly held that the fault lay outside the inspector's department ;" and again : "I have no personal feeling against inspector Stephen."

Judgment.

Galt, C.J.

The judgment should be entered for the defendant.

MACMAHON, J. :—

The action is framed against the defendant Denison in the first place in trespass under section 2 of R. S. O. ch. 73 which provides that : "For any act done by a justice of the peace in a matter in which by law he has not jurisdiction, or in which he has exceeded his jurisdiction, or for any act done under a conviction or order made, or warrant issued by the justice in such matter, any person injured thereby may maintain an action against the justice in the same case as he might have done before the passing of this Act without making any allegation in his statement of claim that the act complained of was done maliciously and without reasonable and probable cause."

The warrant under which plaintiff was arrested was issued by virtue of the authority assumed to have been conferred by R. S. C. ch. 174, sec. 62, which provides that : "If the justice is satisfied by evidence upon oath or affirmation that it is probable the person will not attend to give evidence unless compelled so to do then * * the justice may issue his warrant (L. 3) in the first instance," etc.

This section is taken from the Imperial Act 11 & 12 Vic. ch. 42, sec. 16 which gives the form of warrant for a witness in the first instance, being the same as form (L. 3) appended to our Act.

The magistrate had full power by the Act to issue the warrant, the only question here being whether, in issuing it, on the deposition sworn to, he acted either without or in excess of his jurisdiction. And where the magistrate has done "something which the Act under which he was proceeding can by no means justify, he may properly be said to have exceeded his jurisdiction : " *Cross v. Wilcox*, 39 U. C. R. at p. 194.

Judgment.

MacMahon,
J.

There was an argument addressed to us as to the difference between the requirements of section 60 under which a summons may issue against a witness who will not voluntarily appear, and the requirements of section 62, where a warrant in the first instance is asked for to compel the attendance of a witness. The 60th section says: "If it is made to appear to any justice by the oath or affirmation of any credible person that any person * * is likely to give material evidence for the prosecution, and will not voluntarily appear," etc. While the 62 section provides, "If the justice is satisfied by evidence, an oath or affirmation * * that it is probable the person will not attend to give evidence unless compelled so to do," etc.

The deposition containing the "evidence" upon which the warrant issued, is made by Louis J. St. Denis, who "upon his oath saith," (the deposition sets out a charge of false pretences against one Charles Chamberlain), and continues: "And that one G. B. Gordon of the said city of Toronto, is likely to give material evidence on behalf of the prosecution in this matter, and it is probable that the said G. B. Gordon will not attend to give evidence without being compelled so to do," etc.

The evidence furnished under oath in the deposition, is unquestionably opinion evidence. But notwithstanding its being opinion evidence it may be sufficient to protect the magistrate. "On some particular subjects, positive and direct testimony may often be unattainable; and, in such cases, a witness is allowed to testify as to his *belief* or *opinion*, or even to draw *inferences* respecting the fact in question from other facts, providing these facts be within his personal knowledge. Nor is this course fraught with much danger; because a witness who testifies falsely as to his *belief*, is equally liable to be convicted of perjury with the man who swears positively to a fact which he knows to be untrue:" Taylor on Evidence, 8th ed., sec. 1416.

Cave v. Mountain, 1 M. & G. 257, was an action of trespass against a magistrate where it was held that, "An

information brought before a magistrate, which charges an offence within his cognizance, is sufficient to give the magistrate jurisdiction, and to protect him in an action for false imprisonment, although the information disclose no legal evidence against the alleged offenders, and even although it purport to be founded upon inadmissible hearsay evidence." And in the judgment of Tindal, C. J., at p. 263, he says: "That the information does not disclose any *legal* evidence of the guilt of the prisoner is undoubtedly true; it states nothing beyond mere hearsay, upon which neither judges or juries could act. But, at the utmost, this amounts to no more than an error in judgment on the part of the magistrate; and no case can be found in which a magistrate acting within his jurisdiction has been held liable in an action of trespass for mere error of judgment."

Judgment.

MacMahon,
J.

And in *Mills v. Collett*, 6 Bing. 85, Burrough, J., said, at p. 93: "If the magistrate has jurisdiction * * he never can be liable in an action of trespass, nor in any form of action for a mere mistake in a matter of law."

The act of the police magistrate in reaching a conclusion as to whether the statement sworn to by St. Denis in the deposition, was evidence which should satisfy him, was a judicial act. So that if the evidence appearing in the deposition, is to be regarded as mere opinion evidence, and the magistrate through error, acted upon such evidence, his act was a judicial act, and he is not liable.

Assume that in the deposition St. Denis had stated that he, that morning, had met A. B., who told him that the plaintiff did not intend appearing as a witness; that would have been merely hearsay evidence, and yet, if acted upon, it would have been a mistake in a matter of law for which the magistrate would not have been liable.

As to the present functions of a magistrate in acting upon sworn informations, see *Hope v. Evered*, 17 Q. B. D. 338.

In Oke's *Magisterial Formulist*, 7th ed., p. 303 (regarded as a high authority on procedure in magistrates' courts),

Judgment. a form of deposition is given that a person is a material
MacMahon, witness, and that he will not attend without being com-
J. pelled. The deposition sworn to by St. Denis, does not differ in substance from the form given in Oke. See also Oke's Magisterial Synopsis, 14th ed., 727, and Saunder's Magistrates' Courts, 5th ed., p. 58, where, after referring to 11 & 12 Vic. ch. 43, sec. 7 (from which sections 60 and 62 of our Act are both taken), the author refers to the practice as to taking the deposition, where a warrant is asked for in the first instance; and, according to the practice in England as there laid down, opinion evidence would suffice for the magistrate to act upon in issuing the warrant.

As the act of the magistrate was a judicial act, no responsibility attaches for a mere error of judgment; and the defendant Denison is entitled to judgment as to the causes of action in the statement of claim charging him with trespass.

Then as to the charge against the defendant Denison of maliciously and without reasonable and probable cause arresting the plaintiff. Had the facts been in dispute, the Judge, as a preliminary, must have submitted to the jury the finding of the facts so in dispute, and upon their findings as to these facts, the Judge must then draw the inference as to whether there was or was not a want of reasonable and probable cause for doing the act complained of: *Douglas v. Corbett*, 6 E. & B. 511, and other cases cited in *Hamilton v. Cousineau*, 19 A. R. 203, 219.

In this case, however, there were no disputed questions of fact, and the question of law as to whether there was a want of reasonable and probable cause, should, on the undisputed facts, have been decided by the Judge.

My learned brother Rose at the trial, submitted certain questions to the jury, to which counsel for the defendants objected, and asked that the jury be directed to bring in a general verdict.

This is one of the actions which, by section 84 of the Judicature Act, expressly excepts the right to submit

questions to be answered by the jury upon which the Judge can direct judgment to be entered. The defendants had a right to have a general verdict returned by the jury, so that as to the branch of the case I am now considering, I should have been in favour of ordering a new trial, did I not consider the defendant Denison entitled to a nonsuit.

Judgment.

MacMahon,
J.

The only evidence to shew want of reasonable and probable cause, was that afforded by what is claimed as the absence of all evidence in the deposition to satisfy the magistrate that it was probable the plaintiff would not attend as a witness.

Upon the authorities already referred to of *Cave v. Mountain*, 1 M. & G. 257, and *Mills v. Collett*, 6 Bing. 85, that would afford no evidence of the absence of reasonable and probable cause. As already pointed out, the mistake at most was a mistake in a matter of law, and as said in *Mills v. Collett* (supra), a magistrate never can be liable in any form of action for such a mistake.

There is no pretence that the magistrate was acting otherwise than *bonâ fide*, and in the execution of the duties of his office, when he acted upon the deposition sworn before him in issuing the warrant.

Then as to bail being exacted by the magistrate. The plaintiff did ask to be liberated on his own recognizance, and the magistrate said he would accept plaintiff's recognizance to appear on the 21st. But no recognizance was, in fact, taken. The records of the police court were produced at the trial, and no entry appears therein of any recognizance by the plaintiff. What the police magistrate did was to accept the plaintiff's word that he would appear as a witness on the 21st of the month. See as to "Recognizance," Dalton's Justice, 437.

The defendant Denison is entitled to judgment, dismissing the plaintiff's action, with costs.

Then, as to the defendant Stephen. Did the warrant directing the plaintiff to be brought before the police magistrate to testify as a witness afford any authority to search

Judgment.
MacMahon,
J.

the person of the plaintiff, examine what was in his possession, and cause him to be confined in the cells? Clearly not. The direction in the warrant is to bring the person named therein before the magistrate, "then and there to testify what he shall know concerning the matter of the said information." Beyond that, neither inspector Stephen, nor any other officer, had authority to go, and the unwarranted custom which, from the evidence, had grown up in the police department of treating witnesses with the affronts inflicted upon the plaintiff could not be justified against those who refused to put up with the indignity.

No officer could shield himself behind a warrant if he struck or maltreated a prisoner whom he had apprehended and who was not violent and was not endeavouring to escape. There was much consideration given to the question as to excess by a police officer in *Hamilton v. Massie*, 18 O. R. 585. See the authorities collected in Addison on Torts, 6th ed., p. 719.

What inspector Stephen did was in excess of the authority conferred by the warrant, and he could therefore not justify under it. Being a trespasser, the warrant affords him no protection for searching and imprisoning the plaintiff any more than if he had struck him.

The question of damages was exclusively for the jury, and we cannot say they are excessive.

The motion of the defendant Stephen should, therefore, according to my view, be dismissed, with costs.

[COMMON PLEAS DIVISION.]

GRAHAM V. CANADA LIFE ASSURANCE COMPANY.

PROCTOR V. GRAHAM.

*Insurance—Life Insurance—Policy on Husband's Life for Benefit of Wife
—Assignment by Wife—Separate Estate—R. S. O. ch. 136, secs. 5, 6.*

The interest of a wife in a policy effected by her husband on his own life, and which has been declared by him to be for her benefit, under section 5 of the Act to secure to wives and children the benefit of life insurance, is her separate estate, and may, in her husband's lifetime, be assigned by her. The assignee, under such an assignment, will be entitled to claim thereunder, subject to the exercise by the husband of the powers conferred on him by section 6 of the Acts and amendments.

These were actions by Catherine Graham, to recover Statement. the amount of policies on the life of her husband, from the Canada Life Assurance Company, as insurers, and by one Isaac O. Proctor, as assignee of moneys, payable under the policies which had been assigned to him for the purposes set out in the judgment of the trial Judge.

The defendants, the Canada Life Assurance Company, applied for leave to pay into Court the sum of \$700 in their hands, and an order was made for payment in of such sum less their costs, and also that on such payment, all further proceedings should be stayed as against the company.

The actions were by the order directed to be consolidated; and it was further ordered that the plaintiff Catherine Graham and the said Proctor should proceed to the trial of an issue as to their rights to the said sum of money to be paid into Court, which issue was tried before MACMAHON, J., without a jury, at the Peterborough Assizes, on 24th April, 1893.

The learned Judge reserved his decision, and subsequently delivered the following judgment, in which the facts are stated:—

Judgment.
MacMahon,
J.

MACMAHON, J.—Catherine Graham was married to her husband Christopher Graham in the year 1853. There was no marriage settlement. Christopher Graham died in 1892. Two policies of insurance were issued by the Canada Life on the life of Christopher Graham, one on the 24th of December, 1878, and the other on the 16th of March, 1880, each being for \$1,000, and both said policies are “for the benefit of his wife Catherine Graham for the remainder thereof.”

These policies were, on the 5th of December, 1882, assigned by Christopher and Catherine Graham to William Hargraft, as security for an advance of \$800. And on the 23rd of January, 1886, Hargraft re-assigned the policies to Christopher and Catherine Graham.

There was put in evidence what purported to be an assignment from Mrs. Graham (who cannot write) to Proctor, of a sufficient sum out of the moneys payable to her under the policies of insurance on her husband's life as collateral security for the payment of a promissory note for \$500, made by her husband and indorsed by her, payable on the 1st of December, 1887.

The note and assignment are dated the same day, 25th of October, 1886; and Catherine Graham admitted indorsing the note, but denies executing the assignment.

The assignment was prepared by and the body of the note filled up in the handwriting of Mr. Henry F. Holland, solicitor, of Cobourg, who said he delivered them to Christopher Graham that the note might be indorsed and the assignment executed by Mrs. Graham; and Henry Hewston, whose name appears as a subscribing witness to the execution of the assignment, and who also subscribed as a witness to the indorsement by Catherine Graham of the note, says that she executed the assignment in his presence.

I find that the assignment was executed by Catherine Graham.

The question is: Was the amount represented by the policies the separate property of Catherine Graham?

The assignment by Catherine Graham to Proctor was

after the passing of the Married Women's Property Act of 1884, which, like the English Act of 1882 from which it is taken, repealed the former Married Women's Property Act, but such repeal was not to affect any act done or right acquired, etc., under the former Act.

Judgment.
MacMahon,
J.

Where an insurance is effected by the husband on his life for the benefit of his wife, the moneys so payable would be her separate property. "It is clearly not necessary to express on the face of the policy that the moneys are to be payable to her 'separate use'; they would become her separate property if she married again by virtue of the general provisions of the Act, whether expressed or not: *Lush on Husband and Wife*, 194; *Holt v. Everall*, 2 Ch. D. 266; *Re Mellor's Policy Trusts*, 6 Ch. D. 127, 7 Ch. D. 200.

In *Re March*, 27 Ch. D. 166, at p. 170, Cotton, L. J., said: "In my opinion the Act" (of 1882) "was not intended to alter any rights except those of the husband and wife *inter se*."

This view was concurred in by Kay, J., in *Re Jupp*, 39 Ch. D. 148, at p. 154. And see *Crawley on Husband and Wife*, 98.

In *Turnbull v. Forman*, 15 Q. B. D. 234, it was held that sub-section 4 of section 1 of the Act of 1882, was not retrospective; and, therefore, in an action on a contract made by a married woman *before the passing of that Act*, judgment cannot be ordered in such terms as to be available against separate property to which the defendant became entitled after the date of the contract.

The contract in this case was entered into by Mrs. Graham after the Act of 1884 came into operation, and I am, therefore, not called upon to consider the questions raised in *Reid v. Reid*, 31 Ch. D. 402, and in *Re Roper*, 39 Ch. D. 482. In the latter case the married woman had assigned a life policy to which under the Married Women's Property Act, 1870, she was entitled for her separate use, to the mortgagee as security (with other property belonging to and assigned by the husband) for the mort-

Judgment. gage debt and interest. No question was raised by the
MacMahon, case as to the right of the mortgagee to the life policy.
J.

Before the Act of 1884, Mrs. Graham was entitled to moneys under the policy to her separate use, and after the Act she contracted in respect to such separate property, and the person with whom she so contracted (Proctor) is entitled to recover thereon. See the judgment of Supreme Court in *Jackson v. Moore*, 22 S. C. R. 210, in which the changes effected by the Act of 1884 are fully considered in the judgments of Gwynne and Patterson, J.J.

I direct that judgment be entered for the defendant Isaac Oscar Proctor, dismissing the action of the plaintiff Catherine Graham with costs; and that judgment be entered for the said Proctor on his counter-claim as against the plaintiff Catherine Graham, declaring that he is entitled to be paid out of the moneys in Court (\$649.26) the amount of the said promissory note and notarial—\$502.19, with interest thereon from the 1st of December, 1887, together with costs; to which he is entitled to add the costs of the Canada Life Assurance Company.

The plaintiff moved on notice to set aside the judgment entered for the defendant and to enter the judgment in her favour.

In Michaelmas Sittings, November 29, 1893, before a Divisional Court composed of GALT, C. J., and ROSE, J., *Wallace Nesbitt* and *Stratton*, supported the motion. There was no power in the wife to deal with this property. It was not separate estate within the Married Women's Acts, but merely property in which the wife had a contingent interest, namely, on her surviving her husband. The assignment of the policy was to pay the husband's debts, the very thing it was the intention of the Insurance Act to guard against: *Wicksteed v. Munro*, 13 A. R. 486; *Re Shakespeare*, 30 Ch. D. 169; *Pelton Bros. v. Harrison*, [1891] 2 Q. B. 422-427; *Macalpin v. Young*, 31 Sol. Jour. 409; *Re Eaton*, 23 O. R. 593; *Re Roper*, 39 Ch. D. 482,

488; *King v. Lucas*, 23 Ch. D. 712; *Moore v. Jackson*, Argument, 22 S. C. R. 210; *Re Dykes Estate*, L. R. 7 Eq. 337; *Loibl v. Fraser*, 9 Times L. R. 534. The assignment was also void because it was given merely for the accommodation of the husband: *Darling v. Rice*, 1 A. R. 43, 46. Our Act being similar in terms to the English Act, and the latter having been authoritatively construed by the English Courts, such construction should be adopted by our Courts: *Trimble v. Hill*, 5 App. Cas. 342, 344. The fair result of the evidence is that the wife never did execute the assignment; the wife never dreamt that she was executing an assignment of the policy, and even if it is assumed that she, as a matter of fact, did sign, her mind did not go with her hand: *Rountree v. Richardson*, 9 Times L. R. 297; *Bate v. Canadian Pacific R. W. Co.*, 14 O. R. 625, 15 A. R. 388, 18 S. C. R. 697. But, even if the policy could be assigned, it could only be done in the manner provided for by section 24, namely, by the husband and wife joining in the assignment.

W. R. Riddell, contra. The wife had a vested right in the policy subject to divestment. It is separate estate within the meaning of the R. S. O. ch. 136, and had all the incidents of separate estate, including the right of disposal. If the Legislature had intended there should be no power of disposal, it would have said so, while the very opposite is the case. It has said that the moneys should be free from the claims of the husband's creditors, but it does not say from those of the wife also. The first Act passed, 29 Vic. ch. 17, sec. 5, which gave the husband power to insure for the benefit of his wife, etc., said that the moneys were to be free from the claims of creditors. This was interpreted in Lower Canada, in *Vilbon v. Marsouin*, 18 L. C. Jur. 249, as including the creditors both of the husband and wife. When the Act 47 Vic. ch. 20 (O.), was passed, subsection 1 of section 10 expressly limited the creditors to those of the husband. There is no question but that an insurance policy is property: *Caldwell v. Dawson*, 5 Ex. 1; *S. C.*, 14 Jur. 316. The case of *Pelton Bros. v. Harrison*,

Argument. [1891] 2 Q. B. 422, is quite distinguishable. That was the case of a settlement where the property was vested in trustees, and there was a restraint against anticipation, and it was held that the death of the husband did not remove the restraint so as to make valid a contract made before his death by the wife. *Re Shakespeare*, 30 Ch. D. 169, was also a case of the construction of a settlement. There the wife had not any separate estate during the husband's lifetime, and not even after his death, until she married again. It has been held that there may be a present separate use in a contingent reversionary property, so as to be capable of being disposed of: *Lechmere v. Brotheridge*, 32 Beav. 353. *Moore v. Jackson*, 22 S. C. R. 210, is in point, and our Courts are not bound to follow the decision of co-ordinate Courts in England which are at variance with those here: *Macdonald v. McDonald*, 11 O. R. 187; *McDonald v. Elliott*, 12 O. R. 98. As to the contention that the assignment was made merely for the accommodation of the husband, the case of *Darling v. Rice*, 1 A. R. 43, 46, was decided before the coming into force of the Act of 1884, which is very much wider than the previous Acts; and also, as a matter of fact, there was consideration for the assignment. The case can also be decided on another point. The policies are payable to the wife, and she can assign them at common law irrespective of the Act; if the husband has an interest in the policy, he can assign with her consent: *Porter on Insurance*, 2nd ed., 336. There was a valid assignment here. The assignment was duly executed by the wife. It must also be deemed to have been executed by the husband, as the husband takes under a deed in which the assignment is recited: *Brett v. Cumberland*, Cro. Jac. 521; *Moule v. Garrett*, L. R. 5 Ex. 32; L. R. 7 Ex. 101.

February 3rd, 1894. ROSE, J.:—

The words of the statute, R. S. O. ch. 136, sec. 5 (1887), are those usually employed to create separate estate in equity: *Pelton Bros. v. Harrison*, [1891] 2 Q. B. 422, at p. 425;

Moore v. Jackson, 22 S. C. R. 210, at p. 217. One of the incidents of such estate is the *jus disponendi*. Has the statute R. S. O. ch. 136, while providing for such estate by section 5, put any fetter upon alienation? I think not. Section 7, subsec. (c), provides a mode by which husband and wife can assign a policy, after which the powers conferred by section 6, as amended, could not subsequently be exercised. Reference may also be had to sections 16, 17, and 18. None of these sections, however, states that the wife may not assign her estate in such policy otherwise than under section 7. Such assignment, not joined in by her husband, would, no doubt, leave it open to the husband to subsequently exercise the powers conferred by section 6, and thus to vary or destroy the rights of the wife's assignee under her assignment. In other words, an assignment by the wife not joined in by the husband, would be subject to the exercise by the husband of the powers conferred by section 6.

If the wife died during the husband's lifetime, such assignment by her would also be subject to the provisions of the Act in such cases. See *Wicksteed v. Munro*, 13 A. R. 486. But if she survived her husband, and he had not raised or interfered with the settlement made under section 5, I do not see why her assignee should not claim under the assignment executed in her husband's lifetime.

Wicksteed v. Munro, 13 A. R. 486, was cited to the contrary, but I do not think anything is there decided which is in the way. It was there held that where the beneficiary, a child, died in the lifetime of the insured, the insurance money went into the personal estate of the insured on his death; and observations were made by the learned Judges to the effect that the object of the Act would be frustrated, if by any act of a beneficiary who predeceased the insured, which act was independent of the will or concurrence of the insured, the insurance moneys could be sent to persons whom it was not intended by the Act to benefit. Such may well be the law without this case in any way coming into conflict with the decision or even the *obiter dicta* found in that case.

Judgment.

Rose, J.

Judgment.

Rose, J.

The opinion I am expressing is, that where one of the parties, whom it was intended by the Act to benefit, survives the insured and is entitled to the benefits under a policy made or endorsed in such person's favour under section 5, any person to whom such beneficiary has in his life-time assigned his interest thereunder is entitled under such assignment. The Act protects the beneficiary against the claims of the creditors of the insured, but not against the claims of his own creditors. Where any such protection is to be afforded by restraint upon alienation or otherwise, we find express provisions as under the Free Grant Acts. R. S. O. (1887), ch. 25, secs. 17 to 21.

The case of *McKibbon v. Feegan*, in the Court of Appeal, noted in 14 C. L. J. 5, recognizes, I think, the principle I am endeavouring to give effect to.

This is a case in which it is quite right Mrs. Graham's assignee should recover.

There is no doubt on the evidence that a certain amount of her husband's property was handed back to him on the express agreement of the plaintiff to secure to her husband's assignee for his creditors the payment of the sum here claimed. It is immaterial whether generally a married woman can be made liable as an accommodation endorser, as in this case there was an agreement quite independent of the endorsement, or rather forming the consideration for it and the assignment to the assignee of the claim under the policy, viz., that if the creditors would authorize the assignee to hand back the property referred to, she would secure the payment of \$500 by endorsing the note and assigning her interest in the policy to such extent.

We are, therefore, not called upon to consider the question left undecided in *Darling v. Rice*, 1 A. R. 43, at pp. 46 and 50.

I may say that my brother MacMahon quite concurs in the above finding of fact, which he did not make in his judgment, the point not being necessarily involved in his decision, rested, as it was, upon the grounds there stated.

I do not see, therefore, that we need consider the question so fully and ably discussed before us, arising upon a consideration of the Married Women's Property Act.

Judgment.
Rose, J.

The assignee was, therefore, in my opinion, entitled to receive the moneys herein claimed from the Canada Life Assurance Company under and by virtue of the assignment executed by Mrs. Graham.

I cannot at all yield to Mr. Nesbitt's argument, that if the plaintiff did execute such assignment, her mind did not go with her act. The finding that she did execute, involved the finding that she understood what she was doing, and I think the evidence sustains such a finding.

In my opinion the motion fails, and must be dismissed with costs.

GALT, C. J., concurred.

G. F. H.

[COMMON PLEAS DIVISION.]

REGINA V. LATHAM.

Municipal Corporations—Express Waggon—By-law Licensing Authorizing Rates Fixed Thereby to be Altered by Agreement—Ultra Vires—R. S. O. ch. 184, sec. 436 (O.).

A by-law passed under section 436 of R. S. O. ch. 184, for licensing express waggon, authorized the alteration by agreement of the rates fixed thereby :—

Held, beyond the powers conferred by the statute, and a conviction under the by-law for refusal to pay charges was quashed.

Statement. THIS was an application on behalf of George Latham, to quash a conviction made by John Baxter, J.P., assistant magistrate, upon the complaint of Joseph Madill, that the said George Latham did on the 14th of April, 1893, at the city of Toronto, in the county of York, having hired the licensed express waggon of said Joseph Madill, unlawfully, upon the completion of his order, neglect and refuse to pay to the said Joseph Madill, the sum of \$10.45, being the proper charges for the said services according to the tariff of charges for express waggon, under the provisions of by-law No. 14 of the Police Commissioners for the city of Toronto, contrary to said by-law, as amended by by-law No. 18 of the said Police Commissioners.

By sub-section (1) of section 436 of R. S. O. (1887) ch. 184, "The Board of Commissioners of Police, shall, * * in cities, regulate and license the owners of livery stables, and of horses, cabs, carriages, carts, trucks, sleighs, omnibuses, and other vehicles used for hire, * * and shall establish the rates of fare to be taken by the owners or drivers of such vehicles for the conveyance of goods or passengers," etc. "And may provide for enforcing payment of such rates, and for such purposes shall pass by-laws and enforce the same in the manner, and to the extent in which any by-law to be passed under the authority of this Act may be enforced."

The by-law gave a tariff of charges, and enacted that no higher or other rate should, *unless varied by agreement*, be paid to or be collectable by any person licensed under the by-law. Statement.

The complainant, a teamster, licensed under the by-law, was hired, with his waggon and team, by the defendant, at \$3 a day, to haul earth from a cellar which the defendant was excavating; and he charged that the defendant owed him \$10.45.

One of the grounds of the motion was, that the by-law in sanctioning a varying of rates was *ultra vires*.

In Hilary Sittings, February 9th, 1894, before GALT, C. J., and ROSE, J. *DuVernet*, supported the motion. The rates established by the by-law must be regarded as the sole basis for computing the sum chargeable to, and enforceable against the hirer of the waggon, and the provision of the by-law which sanctions a varying or disturbance of such rate by agreement between the parties renders the by-law *ultra vires* of the Police Commissioners.

No one appeared in support of the conviction.

February 9, 1894. ROSE, J.—

The section of the by-law authorizing the varying of the rates fixed by the by-law is beyond the powers conferred by sec. 436 of Municipal Act, R. S. O. ch. 184. The conviction, therefore, cannot be sustained and must be quashed.

GALT, C. J., concurred.

G. F. H.

[CHANCERY DIVISION.]

HAIGHT

v.

THE WORTMAN AND WARD MANUFACTURING COMPANY.

Master and Servant—Negligence—Workmen's Compensation for Injuries Act—Defect—Knowledge of Danger—Full appreciation of Risk.

To disentitle a workman from recovering damages for a defect in a machine, under the Workman's Compensation for Injuries Act, he must not only have a knowledge of the danger he incurs, but also a thorough comprehension or appreciation of the risk he runs.

The plaintiff when formerly in the employment of the defendants had knowledge of a defect in a machine in their factory, and after leaving had returned to such employment, and had again worked at the machine, knowing that the defect, of which the defendants were aware, had not been remedied. The jury having found that he did not fully appreciate the risk he ran :—

Held, that he was entitled to recover.

Statement.

THIS was a motion to set aside a judgment in an action under the Workmen's Compensation for Injuries Act, 1892, 55 Vic. ch. 30 (O.), in which the plaintiff, had recovered judgment for \$250.

The action was tried at the Autumn Assizes at London on October 10th, 11th and 12th, 1893, before FALCONBRIDGE, J., with a jury.

E. R. Cameron and *J. C. Judd*, for the plaintiff.

I. F. Hellmuth and *P. H. Bartlett* for the defendants.

The plaintiff was operating a small circular saw, making what is known as an "overhead cut" in boards. This is effected by the workman placing the end of the board nearest to him against a stop or block, fastened to the table through which the saw revolves, and then by holding the other end of the board up and pressing that end on the saw a cut is made longitudinally through the board, which after coming down flat on the table is pressed forward against the saw until the cut is complete.

The block in question was defective through continued user and nailing, and owing to pressure gave way, the board twisting and bringing the plaintiff's fingers in contact with the saw. Statement.

Questions were submitted to the jury, which with the answers to them were as follows:

1. Did the plaintiff suffer the injury complained of by reason of any defect in the condition or arrangement of the machinery or plant used in the business of employers?

Ans. Yes.

2. If so, what was or were such defect or defects? Ans. A defective stop block by continuous nailing and saw out of repair.

3. Was the plaintiff guilty of any contributory negligence? Ans. No.

4. Was the accident caused by the negligence of the plaintiff? Ans. No.

5. If so, wherein did such negligence consist? Ans. No negligence.

6. Did the plaintiff freely and voluntarily with a full knowledge of the nature and extent of the risk he ran impliedly agree to incur it? Ans. Yes, but not with a full knowledge.

7. Did the plaintiff know of the defect which caused his injury, and fail, without reasonable excuse, to give or cause to be given, within a reasonable time, information thereof to the defendants or some person superior to himself in the service of the defendants? Ans. Yes.

8. If he did so fail to give or cause to be given information, was he aware that the defendants or such superior officer already knew of the said defect? Ans. Yes.

9. If the plaintiff is entitled to recover at all, what is a fair sum to allow by way of compensation. Ans. \$250.

On these findings the Judge directed judgment to be entered in favour of the plaintiff, and against this judgment the defendants moved on December 12th, 1893, before the Divisional Court composed of BOYD, C., and MEREDITH, J.

Argument.

Hellmuth, for the motion. There is no evidence of negligence on the part of the employers. It was the duty of the workman to put the block securely on. His mate did it in this case, and he did not test it. He had worked at the same machine before, on his prior engagement with the defendants, and when he re-engaged knew how the block was attached and the machine operated, and voluntarily incurred the risk. The maxim *Volenti non fit injuria* applies. The answer of the jury to the sixth question finds that the plaintiff was *volens*, although they have attempted to qualify the finding by also finding that he had not full knowledge. The question is not whether he was *sciens*, but whether he was *volens*. Besides, there is no evidence to support the finding that he had not full knowledge, and by the answers to questions seven and eight, the jury find knowledge; there is, therefore, a finding by the jury of both *volens* and *sciens*. I refer to *Walsh v. Whiteley*, 21 Q. B. D. 371; *Headford v. The McClary Manufacturing Co.*, 23 O. R. 535; *Black v. Ontario Wheel Co.*, 19 O. R. 578.

E. R. Cameron, contra. The question of *volens* is altogether for the jury, and they have found it in favour of the plaintiff. There could be no *volens* in law without full knowledge, and the jury have found that the plaintiff had not that knowledge.

January 22, 1894. BOYD, C. :—

The findings of the jury are not attacked as being without evidence to support them, and though I doubt whether I should have found the same way, it cannot be said that there is not evidence to support their conclusions. Taken together they find that while the plaintiff had knowledge of the defects which occasioned the injury, and to that extent agreed to accept the employment, yet he did not agree with a full knowledge of the nature and extent of the risk he ran.

To disentitle the workman to recover there must be the

concurrence of the two ; there must be not only the knowledge of the danger, but a thorough comprehension or appreciation of the risk ; if, with this knowledge and appreciation he voluntarily encounters the risk, then his action fails.

Judgment.

Boyd, C.

This case is much like *Amos v. Duffy*, 6 Times L. R. 339, where the plaintiff had for a long time worked at a circular saw, fixed in a bench. There was a movable guard fixed with a screw so as to protect the hand. The plaintiff had noticed that the screw was loose, and complained to the foreman who promised to put in a fresh screw, but did not do so. The jury was in favour of the plaintiff, and the Court held that this meant that the plaintiff did not undertake the work with full knowledge of the extent of the danger which he incurred in working the guard with a loose screw. And all the Judges agreed that there was evidence to shew that though he knew of the danger he did not exactly appreciate it.

The defects found to exist in this case are (1) the stop block, defective by continuous nailing, and (2) saw, out of repair. Of both, complaints had been made to the employers' foreman, and it is found that the defendants were aware of their defects.

The plaintiff had been some three years employed by the defendants, then after an interval went back and was employed in the same way from March to June. He returned without any complaint as to the defects in the machine he was to work, and it is strongly argued that this resumption of work is different and more cogent than a mere continuance in the employment, so as to manifest a voluntary incurring of the risk. See sec. 6, sub-sec. 3 at end, 55 Vic. ch. 30 (O.). But this I take to be a matter for the jury, and they have found that he did not fully appreciate the risk thus voluntarily incurred.

In *Brooke v. Ramsden*, 63 L. T. N. S. 287, Mr. Justice Smith said, at p. 288: "There must be a thorough comprehension on his part of the danger and the risk, and a voluntary undertaking by him of that risk and danger."

Judgment.

Boyd, C.

In that case he knew of the defect, and so did his employers, but he, nevertheless, kept on his work in order not to lose wages. In brief it may be thus put: the plaintiff knew the facts which created the danger, and which are in this case attributable to the neglect of the employer, but he did not thereby accept the risk so as to relieve the employer from the injurious consequences of that neglect. The defective machine in which the danger was increased by the default of the master to remedy the defects occasioned the accident to the workman, and the evidence, in the opinion of the jury, fails to shew that the workman accepted the risk of injury arising from that negligence.

As put by Lord Watson in *Smith v. Baker*, [1891] A. C. at p. 357: "The question whether he had accepted the risk is one of fact; there is no arbitrary rule of law which decides it. The complaints made to the foreman * * coupled with the fact of continuing to work, might be fairly construed as an intimation that [the employer] must either discontinue [the dangerous thing] or take the consequences. It was a protest against the practice, which does not naturally or necessarily imply that [the workman] was willing to submit to it or to accept the risk of it."

Lord Herschell goes to the same extent, and indeed further, where in the same case he says at p. 365: "Where a servant has been subjected to risk owing to a breach of duty on the part of his employer, the mere fact that he continues his work, even though he knows of the risk, and does not remonstrate, does not preclude his recovering in respect of the breach of duty, by reason of the doctrine, *Volenti non fit injuria*," which in my opinion has no application to such a case.

I think the judgment must be affirmed with costs.

MEREDITH, J. :—

The defendants were wrong in not providing and maintaining proper machinery and appliances—machinery and appliances reasonably fit for the work: in setting their servants to work at this defective and dangerous piece of

machinery ; dangerous enough, if all proper safeguards were provided, very much more dangerous, when used in the somewhat primitive method of nailing to the table, from time to time as every shift might occasion, a stop block, and with a defective saw—said to be warped, with some teeth out, and not properly filed. Judgment.
Meredith, J.

A master, even according to his common law duty, is bound to take reasonable care of his servants, and to inform them of extraordinary risks : this is sometimes lost sight of in the wide spread effect of the doctrine of common employment.

But in this case it is said that the plaintiff knew of the defects which caused his injury, and, although during a former service he may have given information thereof to the defendants, yet he re-entered such service without objection, knowing that the defects still existed, and, therefore, cannot, either at common law or under the Act, recover.

There however seems to me to be more than one complete reply to this contention.

In the first place, the jury have found that the plaintiff had not a full knowledge of the defects ; and then they have also found that no information of any defects was given by him because he was aware that his employers, or some person superior to him in their service, knew of such defects.

The latter finding has reference to the period of the later service only, the learned Judge having directed the jury to “consider the case solely with reference to the notice which he claims he gave during the period of his late engagement,” and is not inconsistent with the evidence that such information was given during his prior service : and in this connection, it must be borne in mind that the plaintiff was never employed specially to work at this particular machine, but was occasionally, from time to time, required to work at it, and apparently was so required but the once—when he was injured—during the period of his later employment.

Judgment.
Meredith, J.

The first of these findings would seem to leave the defendants liable either at common law or under the Act: see *Osborne v. The London and Northwestern R. W. Co.*, 21 Q. B. D. 220; and *Smith v. Baker*, [1891] A. C. 325: and the second to leave them liable under the Act: see sec. 6, sub-sec. 3, 55 Vic. ch. 30 (O.).

It was urged that because of the fact that the plaintiff went back to work with a knowledge that the defects he complained of had not been remedied, it must be presumed that he agreed to take all risks arising from such defects.

But even had the jury found—as they well might have upon the whole evidence—that the plaintiff had re-engaged with a full knowledge and appreciation of the whole risk he would run if put to this work again, as doubtless he would at times be, yet by our Act his right of action would, under the second of these two findings, be saved.

Sub-section 3 of section 6 expressly saves the right of action where the workman knew of the defect, and failed, without reasonable excuse, to give information, if—as the jury have found—the employer, or some person superior to the workman in the service of the employer, already knew of it.

Now the only ground upon which it was contended that this saving clause is not to be applied is, that the plaintiff by re-entering the defendants' service without objection, and continuing in such service for some time, without complaint respecting the danger to be incurred whenever required to work at this machine, impliedly deprived himself of the benefit of the Act; but our Act expressly prevents a workman contracting himself out of its benefits, unless for ample and adequate consideration other than the consideration of being taken into or continued in employment, in a contract not improvident but just and reasonable; and from at all contracting himself out of the benefits of the 8th section; and continuing in employment alone has no effect: section 6, sub-section 3.

No ground was suggested upon which the reasonable damages awarded can be reduced ; and the second finding, before referred to, at least is sufficiently sustained in evidence.

The motion therefore wholly fails.

G. A. B.

[CHANCERY DIVISION.]

McMULLEN V. VANNATTO ET AL.

Landlord and Tenant—Notice of Forfeiture—R. S. O. ch. 143, sec. 11, sub-sec. 1—Distress after Ejectment brought—Effect of.

A notice of forfeiture of a lease under R. S. O. ch. 143, sec. 11, sub-sec. 1, given in the words "You have broken the covenants as to cutting timber, etc.," without more particularly specifying the breach and claiming compensation, is sufficient.

After an action of ejectment was commenced for the forfeiture of the lease the landlord distrained for and received rent subsequently accruing due :—

Held, that such course did not *per se* set up the former tenancy, which ended on the election to forfeit manifested by the issue of the writ, but might be evidence for the jury of a new tenancy on the same terms from year to year.

THIS was a motion to set aside a judgment directed to be entered for the plaintiff, and to enter judgment for the defendants, or for a new trial.

The action was one of ejectment, begun the 1st June, 1893, to recover possession of certain land, leased by the plaintiff to the defendants, they having cut timber contrary to their covenant contained in the lease. The plaintiff had given the notice required by R. S. O. ch. 143, sec. 11, sub-sec. 1, in the following words : "I hereby give you notice that you have broken the covenants as to cutting timber on the premises, being * * which you hold of me under a lease bearing date * * , and made between myself, as lessor of the first part, and you as lessees of the second part, containing such covenants ; and I require you

Statement.

Statement. to pay me forthwith or within a reasonable time after service of this notice on you, fifty dollars as compensation for such breach of covenant."

The action was tried at Cobourg on October 23rd, 1893, before FALCONBRIDGE, J., and a jury.

F. E. Hodgins, for the plaintiff.

W. R. Riddell, for the defendants.

The jury brought in a verdict for the plaintiff for possession, and eighteen dollars damages.

During the trial it appeared that pending the action the plaintiff had, on the 4th October, 1893, distrained for and collected one year's rent, which fell due on the 1st of October, 1893 (after the action was commenced), but which was the rent for a year beginning the 1st of April, 1893, and ending the 1st of April, 1894.

Defendant's counsel obtained leave and was heard on November 13th, 1893, before the trial Judge on the question of entering the judgment, when the plaintiff's counsel was not called upon, but judgment was ordered to be entered in favour of the plaintiff for possession, and eighteen dollars damages, and a plea was allowed to be added, setting up the distress, so that its sufficiency could be argued before the Divisional Court.

The defendants then moved against the judgment upon the ground that the notice of forfeiture was not sufficient, and that the distress after action was a waiver of the forfeiture, and the motion was heard on December 19th, 1893, before a Divisional Court, composed of BOYD, C., and FERGUSON, J.

W. R. Riddell, for the motion. The notice given was not sufficient. It does not specify the particular breach complained of: R. S. O. ch. 143, sec. 11, sub-sec. 1. It merely stated "you have broken the covenants as to cutting timber." That is not enough. That does not specify the par-

ticular breach; *Re Arthur Average Association, etc., Ex p. Hargrave & Co.*, L. R. 10 Ch. 542. It does not even say the defendants cut any timber, but merely that they broke the covenants as to cutting. There is a difference between particulars of covenants and particulars of breaches: *Doe d. Winnell v. Broad*, 2 M. & G. 523. A Court will order particulars of covenants, particulars of breaches, and particulars of times: *Watson v. Brewer*, 4 P. R. 202.

[BOYD, C.—But have you not waived the notice? Can you go on with the action and be beaten on the facts and then go back to the sufficiency of the notice.]

Yes, because the section of the statute provides that no right of forfeiture shall be enforceable by action until the notice is served. The notice here may mention the particulars of the covenant, but it does not mention those of the breaches: *Doe d. Birch v. Phillips*, 6 T. R. 597; 1 Tidd's Practice, 8th ed., 643; Tidd's Forms, 671; Bullen & Leake's Precedents, 3rd ed., 204. Besides, this notice demanded an unreasonable amount, \$50, when the jury only fixed the amount at \$18: Addison on Torts, 6th ed., Wood's, par. 503, at p. 526, citing *Abingdon v. Lipscombe*, 1 Q. B. at p. 780. The same particularity should be followed in the notice as would be ordered, and it should shew what is claimed: Wade on Notice, par. 637, p. 285.

[BOYD, C.—But surely there might be a difference between a notice given by a farmer and a skilled draftsman.]

After this action was commenced the plaintiff distrained and recovered his rent, and that operates as a waiver of the forfeiture. The rule is that distress after action brought does not operate as a bar to the action when the rent distrained for accrued due before action brought, and that is this case. *Grimwood v. Moss*, L. R. 7 C. P. 360; *Laxton v. Rosenberg*, 11 O. R. 199, go only that length. See also *Evans v. Wyatt*, 43 L. T. N. S. 176. Where action brought for the forfeiture of a lease acceptance of rent afterwards is a waiver of the forfeiture, for it is a penalty, and the acceptance waived the penalty:

Argument. *Doe d. Cheny v. Batten*, Cowp. 243, at p. 247 (per Aston, J.); *Doe d. Morecraft v. Meux*, 4 B. & C. 606. Moreover, if the writ, besides asking for possession, claims another remedy inconsistent with it, the principle does not apply: Foa's Law of Landlord and Tenant, p. 538; *Evans v. Davis*, 10 Ch. D. 747. Here the claim is for rent accruing due after action brought, and this rent is claimed as due under the demise.

F. E. Hodgins, contra. The effect of the distress was not discussed at the trial. After the jury had found against the defendants on all points, application was made for leave to amend, and leave was given really to allow it to come before the Divisional Court. If the amendment is allowed to stand, which it should not be, there is still a question to be tried as to the intention of the plaintiff in distraining and receiving the rent. There was no judgment here for *mesne* profits, because they were paid in the distress. The mere fact of the distress would not operate as any waiver of the forfeiture, the intention must be shewn: *Grimwood v. Moss*, L. R. 7 C. P. 360; *Laxton v. Rosenberg*, 11 O. R. 199; *Denby v. Nicholl*, 4 C. B. N. S. 376; *Jones v. Carter*, 15 M. & W. 718; Woodfall on Landlord and Tenant, 15th ed., 343. As to demand of larger amount than recovered, see *Skinners' Co. v. Knight*, [1891] 2 Q. B. 542. The receipt of rent is an equivocal act, and the landlord is entitled to shew with what intention it was received: *Doe d. Cheny v. Batten*, Cowp. 243; *Doe d. Digby v. Steele*, 3 Camp. at p. 118; and that should be tried. As to the propriety of the amendment, I refer to *Newby v. Sharpe*, 8 Ch. D. 39; *Collette v. Goode*, 7 Ch. D. 842; *Edevain v. Cohen*, 41 Ch. D. 563. Then, as to the sufficiency of the notice: This is the first case under the statute, and the trial Judge is in favour of the plaintiff. All the cases cited by the other side are under the old practice and should not be followed. Under our statute, section 11, sub-section 2, any wrong done by a notice can be dealt with by the Court, but even if it was a defective notice it should not be a bar

to an action. Even no notice is no bar: *Scott v. Brown*, Argument, 51 L. T. N. S. 746. The lessor must merely tell the lessee what he wants done. The lessee is entitled to know what his landlord complains of, and if his landlord is entitled to compensation, whether he wants compensation. The true construction is that the lessor shall give notice of what he requires to the lessee: *Lock v. Pearce*, [1893] 2 Ch. 271, at p. 279; *Coatsworth v. Johnson*, 54 L. T. N. S. 520. The landlord is only bound to give fair notice so the parties can settle the matter without resort to a Court. The landlord's right is not taken away, only modified: Woodfall, 15th ed., 350. I refer to *Cox v. Hamilton Sewer Pipe Co.*, 14 O. R. 300; *Langford v. Kirkpatrick*, 2 A. R. 513, at p. 518; *Prickett v. Gratrex*, 8 Q. B. 1020; *Jones v. Bird*, 5 B. & Al. 837.

Riddell, in reply. The act of the landlord, not the intention governs: *Croft v. Lumley*, 6 H. L. C. 672.

February 15th, 1894. BOYD, C.:—

Commenting on the English original of our section 11, R. S. O. ch. 143, as to notice of forfeiture in a lease, Lindley, L. J., said: "The sense of that is, that the lessor must tell the lessee what he wants done": *Lock v. Pearce*, [1893] 2 Ch. at p. 279. That is the sole object of the notice, "specifying the particular breach complained of."

A letter had preceded the notice required by the statute in which the plaintiff made complaint that the tenant was cutting wood in the woods without the landlord's authority, and warning him not to cut in any place without being instructed by the landlord, and the notice given was that the defendant had broken the covenants in the lease as to cutting timber and claiming fifty dollars compensation.

The defendant does not pretend he was misled by the notice, or that he did not know the special grievance between them, but pleads that the cutting in question was done by express arrangement with the landlord that a particular place should be cleared, and in this the jury have given against the tenant.

Judgment.

Boyd, C.

I think the notice is sufficient, being intelligible and precise as between man and man—though perhaps not up to the rules observed in the Courts for particularity in pleading. These notices are intended to be given by laymen, and where no misconception appears, the Court should not be asked at the end of litigation adverse to the tenant, to help him in an unmeritorious criticism that the notice was not “specific.”

The next point is as to the effect of a distress pending “action.” The action was begun in June, 1893; a year’s rent fell due 1st of October, 1893, running from 1st of April, 1893, to 1st of April, 1894; and on 4th of October, 1893, the plaintiff levied a distress and was paid thereunder a year’s rent. The trial Judge allowed this fact to be set up by way of amendment. It is objected that the amendment was improper, and if allowed, it should be sent back for trial as to the intent and effect of the act; the landlord being willing to account for what he has thereby received.

In *Doe d. Cheney v. Batten*, Cowp. 243, Aston, J., said: “Where an ejectment has been brought on the statute * * for forfeiture of a lease, there being half a year’s rent in arrear, and no sufficient distress upon the premises; there, acceptance of rent afterwards by the landlord, has, I believe, been held a waiver of the forfeiture of the lease, which may well be, for it is a penalty, and by accepting the rent the party waives the penalty.” p. 247.

This dictum does not appear to be law, having regard to the fact that the bringing of ejectment, pure and simple, is an unequivocal and irrevocable election to end the tenancy, and the subsequent acceptance of rent or distress for it, will not operate as a waiver: *Grimwood v. Moss*, L. R. 7 C. P. 360. That decision, however, is to be limited to the case of a distress for rent due after the breach and before the action of ejectment.

Here the distress was for rent that became due after breach and writ issued and pending the ejectment. The effect of that *per se* appears to be not to set up the for-

mer tenancy (which ended on the election to forfeit, manifested by the issue of the writ), but may be evidence of a new tenancy on the same terms from year to year—a question proper to be submitted to the jury.

Judgment.

Boyd, C.

I am the more disposed to favour this course of submitting to a jury the new matter which the trial Judge allowed to be put on the record, because of the equivocal nature of the plaintiff's pleading. He not only asks for possession and damages for breach of covenant, but also for arrears of rent from the 1st of October, 1892. The rent paid in October, 1892, would be for the year from 1st of April, 1892, to 1st of April, 1893. The writ was issued in June, 1893, so that in effect part of the current year's rent was sought and was afterwards distrained for when it fell due in October, 1893. See *Evans v. Davis*, 10 Ch. D. at p. 763, as to the effect of this joinder of claims.

The case decided by Lindley, J., of *Evans v. Wyatt*, 43 L.T. N. S. 176, covers the new defence raised by the leave of the Judge. That was an action of ejectment to recover possession for breach of covenant, and pending action the plaintiff accepted rent which had accrued due after the bringing of the action, and it was said these facts, coupled with the question *quo animo* the rent was received, were evidence of an agreement for a new tenancy—probably one from year to year on the terms of the old lease.

On this ground, I should favour the further trial of the case—with leave to shape the further pleadings as advised—but this is eminently a case which the parties should settle without further expensive litigation.

If the parties proceed the defendants should pay costs of the action up to the time when the new plea was allowed to be added as in the nature of one *puis darrein continuance*—the subsequent costs will be reserved before the trial Judge.

FERGUSON, J. :—

I entirely concur in the view taken by the Chancellor, and think there should be a further trial of the case for the reasons and on the terms stated in his judgment.

Judgment. I also agree in the view that it is eminently a case in which the parties should endeavour to arrive at a settlement of their differences.

Ferguson, J.

G. A. B.

[CHANCERY DIVISION.]

MCMYLOR V. LYNCH ET AL.

Will—Direction to Sell Lands—Names or Descriptions of Devisees—Trust—Charitable Use—Mortmain—Augmentation of Particular Fund or Residuary Estate—Interest—Power of Executor—Dower—Election—Costs.

A testator by his will provided as follows :—

“ I do order and direct that my executor sell the real estate owned by me, such sale to be made inside of three years from the date of my decease, and out of the proceeds of the said sale to pay to the Archbishop of the Diocese of Toronto, \$500 ; to the Bishop of the Diocese of Hamilton, \$500 ; to be applied for the education of young men for the priesthood, and the balance invested by my executor in the proportion of \$15 for my wife, and \$8 for my mother.

“ At my mother's death, I order that her proportion * * be divided * * ” between five nieces, and that “ on my wife's death, her proportion * * be divided ” between nephews and nieces.

“ All the residue of my estate not hereinbefore disposed of, I give, devise and bequeath unto my wife ” :—

Held, that the bequests to the Archbishop and Bishop named in the will being essentially different from their names in their corporate capacity, were intended for them individually, subject to the trust declared, the purpose of which was a charitable use, and that the money being derived from the sale of land, the legacies failed, and the amount went to augment the residuary gift of the particular fund out of which it was directed to be paid, and not the general residue of the estate.

As the land was directed to be sold within three years from the testator's death, the legacies bore interest from the date when the lands should have been sold.

That as there was no special devise of the real estate but only a direction to the executors to sell and pay legacies, the land and rents arising therefrom belonged to the widow, under the general residuary gift to her, and that the executor had no power to lease.

That the widow was not bound to elect between her dower and the will. Costs ordered to be paid out of the real estate as the litigation had related to it.

Statement. THIS was an action brought for the purpose of having the will of Patrick Lynch construed.

The material facts were not in dispute, and are set forth in the statement of claim, together with the will in question and the matters as to which a construction was asked.

The statement of claim was as follows :—

1. The plaintiff is the executor of the last will and testament of Patrick Lynch, late of * *, who died on or about the 21st of February, A.D. 1891. * *.

2. By the said last will, * * bearing date the 2nd day of February, 1891, the said testator after revoking all former wills, directed his debts, funeral and testamentary expenses to be paid by his executor out of his personal estate ; and the said will then proceeded in the following words : “ I give, devise and bequeath all my real and personal estate of which I may die possessed, in the manner following, that is to say :

“ I order and direct that a sale be called by my executor as soon as possible after my decease, out of which all my just debts, funeral and testamentary expenses be paid, and the sum of two hundred dollars be paid to Rev. Father Gibney for the purpose of masses for the repose of my soul ; and that fifty dollars (\$50) be also given to Father Gibney for the purpose of masses for the soul of my deceased father, and fifty dollars be given my mother for the purpose of having masses said for the repose of her soul ; and the balance of the proceeds of the said sale to be divided between my wife Alice and my mother Mary Lynch, in the proportion of fifteen dollars to eight dollars respectively.

“ I do order and direct that my executor sell the real estate owned by me, * * such sale to be made inside of three years from the date of my decease ; and out of the proceeds of the said sale, to pay to my brother James Lynch the sum of twelve hundred dollars ; to the Archbishop of the Diocese of Toronto, the sum of five hundred dollars ; to the Bishop of the Diocese of Hamilton, the sum of five hundred dollars ; the two latter sums to be applied for the education of young men for the priesthood, and the balance to be invested by my executor in the proportion of fifteen dollars for my wife Alice Lynch, and eight dollars for my mother Mary Lynch ; and the interest of the said investment to be paid at least yearly.

“ At my mother's death, I order that her proportion of

Statement. the principal sum be divided, share and share alike between Mary Egan and Elizabeth Egan, daughters of my sister Ellen Egan, and the three daughters now unmarried of my sister Johanna Hischen.

"I order and direct that on my wife's death the proportion of principal invested for her benefit be divided share and share alike between the children of my brothers and sisters.

"All the residue of my estate not hereinbefore disposed of I give, devise and bequeath to my wife Alice Lynch."

3. The plaintiff proceeded to sell and realize all the personal property of the said testator and out of the proceeds thereof paid the debts, and funeral and testamentary expenses, and paid the sum of \$300 bequeathed for masses by the said will, and divided the balance of the proceeds of the sale of the personalty between the defendant Alice Lynch, the widow of the testator, and the defendant Mary Lynch, the mother of the testator, in the proportion of \$15 to the said Alice Lynch and \$8 to the said Mary Lynch, respectively.

4. The only portion of the said estate which is left in the hands of the executor is the land and the rents received from the said land since the date of the death of the said testator.

5. The plaintiff is in doubt as to the proper construction of the said will and on account of the conflicting claims made by the defendants, and doubt as to the validity of the bequests to the Archbishop and Bishop therein named, and for other reasons arising out of the construction of the said will; the plaintiff submits the same to this Honourable Court for its true and correct interpretation.

The following are the questions in doubt:—

(a) Whether or not the bequest of the sum of \$500 to the Archbishop of the Diocese of Toronto and the bequest of \$500 to the Bishop of the Diocese of Hamilton, both payable out of the real estate, for the education of young men for the priesthood, are valid devises or bequests, or whether the same are in contravention of the statutes commonly called the Statutes of Mortmain.

(b) If the said bequests are valid, whether the defendants, the present Archbishop of the Diocese of Toronto, and the present Bishop of the Diocese of Hamilton, are entitled to the said devises or bequests, respectively, for the said purposes; or whether the defendants, the Roman Catholic Episcopal Corporations, respectively, are entitled to the same. Statement.

(c) If the said bequests are not valid, whether the defendant Alice Lynch, as residuary devisee and legatee, takes the said thousand dollars absolutely; or whether the said Alice Lynch and Mary Lynch are entitled as residuary devisees and legatees under the bequest or devise of the balance of the proceeds of the sale of the said farm in the proportions mentioned in the will, the nephews and nieces of the testator being in that case entitled to the reversionary interests therein after the death of Alice Lynch and Mary Lynch aforesaid.

(d) Who is entitled to the rents and profits of the said land during the period between the death of the testator and the sale of the same?

(e) Whether the said defendant Alice Lynch, the widow of the testator, is put to her election between dower in the said lands and the benefits conferred upon her by the said will, under that clause which devises the land in question?

(f) Whether the plaintiff is entitled to lease the said land for a term of years in default of sale?

6. The said Roman Catholic Episcopal Corporations respectively are corporations sole, the constituent persons of which in each case are the Archbishop and the Bishop, respectively, named as defendants.

7. The plaintiff, pursuant to the terms of the said will, has at various times by private offer endeavoured to sell the said lands, but has never received an offer of a high enough sum for the same, and in the meantime has received, from letting the same, various sums of money by way of rent, and lately, at or about the time of issuing the writ herein, offered the said lands for sale by public auction,

Statement. but did not receive a high enough bid to justify him in selling the same.

8. * * * * *

9. The plaintiff further submits that on account of the difficulty in effecting a sale of the lands, and on account of the doubt whether or not the widow is entitled to dower, the said lands should be sold under the order and direction of this Honourable Court and the proceeds thereof administered pursuant to the said will.

The action came on by way of motion for judgment on the pleadings, and was argued on February 22nd, 1894, before STREET, J.

E. D. Armour, Q. C., for the plaintiff, stated the case and submitted the questions raised.

J. Hoskin, Q. C., for the infants. The bequests to the Archbishop and Bishop are encumbered with a charitable trust, and being derived from the sale of land, are void under the Statutes of Mortmain. They cannot take as individuals, as the bequests are really for the benefit of a church: *Thorner v. Wilson*, 3 Drew. 245; *Gibson v. Representative Church Body*, Ir. R. 9 Ch. 1. A bequest to educate young men for the priesthood, is a charitable bequest: *The Attorney-General v. Gladstone*, 13 Sim. 7; *Beaumont v. Oliveira*, L.R. 4 Ch. 309; *Gillies v. McConochie*, 3 A. R. 203. If these bequests are void, there is a lapse, the money goes to the special legatees: *Fulton v. Fulton*, 24 Gr. 422; *Champney v. Davy*, 11 Ch. D. 949. The widow must elect between her dower and the benefits under the will, otherwise she would disturb the provisions of the will: *McGregor v. McGregor*, 20 Gr. at p. 453; *Re Quimby—Quimby v. Quimby*, 5 O. R. 738; *Card v. Cooley*, 6 O. R. at p. 234; *Dawson v. Fraser*, 18 O. R. 496.

C. E. Hewson, for Alice Lynch (the widow). The will was only made nineteen days before the testator's death. The Ontario Mortmain Act, 55 Vic. ch. 20 (O.), does not apply, as the death took place before it was passed. The be-

quests are void whether to the corporations the Archbishop and Bishop represent, or to them as individuals: *Labatt v. Campbell*, 7 O. R. 250; *Parkhurst v. Rcy*, 27 Gr. 361; *Purcell v. Bergin*, 20 A. R. at pp. 559, 560; *Page v. Leapingwell*, 18 Ves. 463. When these bequests fail, they fall into the general residue of the estate: R. S. O. ch. 109, sec. 27; *Patching v. Barnett*, 28 W. R. 886; *Reynolds v. Kortwright*, 18 Beav. at p. 427; *Leake v. Robinson*, 2 Mer. at p. 393; *Turner v. Buck*, L. R. 18 Eq. 301. The widow is not bound to elect.

F. A. Anglin, for the Archbishop, the Roman Catholic Episcopal Corporation for the Diocese of Toronto, Mary Lynch (the mother), and Mary Egan. The corporation does not claim the bequest. The bequest is good to the Archbishop as an individual. There is no reference to the corporate character. The gifts are personal to be administered according to the individual judgment and discretion of the Archbishop: *Purcell v. Bergin*, 20 A. R. per MACLENNAN, J.A., at p. 560. There was no valid binding trust attached by the words used: *Byne v. Blackburn*, 26 Beav. 41; *Mackett v. Mackett*, L. R. 14 Eq. 49; *Benson v. Whittam*, 5 Sim. 22; *Biddles v. Biddles*, 16 Sim. 1. In *The Attorney-General v. Gladstone*, 13 Sim. 7, and *Gillies v. McConochie*, 3 A. R. 203, the question was uncertainty. Even if there was a trust, the amount is limited, and so the case comes within *Attorney-General v. Baxter*, 1 Vern. 248; *Thomas v. Howell*, L. R. 18 Eq. at p. 207. If the charitable legacies fail, the lapse augments the residue of the particular fund, and not the testator's general residuary estate. The framework of the will shews such an intention: *Jull v. Jacobs*, 3 Ch. D. 703. The balance of this fund is indefinite as to amount, and is a true residue—and the lapsed legacies fall into it: *In re Birkett*, 9 Ch. D. 576; *Falkner v. Butler*, Amb. 514; *Petre v. Petre*, 14 Beav. 197; *De Trafford v. Tempest*, 21 Beav. 564; *Champney v. Davy*, 11 Ch. D. 957; *In re Vaughan—Vaughan v. Thomas*, 33 Ch. D. 187-190; *Dawson v. Small*, L. R. 18 Eq. 114; *In re Williams*, 5 Ch. D. 735; *Carter v. Taggart*, 16 Sim. 423.

Argument.

Argument.

E. Furlong, for the Bishop and the Roman Catholic Episcopal Corporation of the Diocese of Hamilton. The devise to the Bishop was good under 8 Vic. ch. 82, and 40 Vic. ch. 58 (O.), as the will was registered. I also refer to *Doe d. Phillips v. Aldridge*, 4 T. R. 264; *Ruitz v. The Roman Catholic Episcopal Corporation of the Diocese of Sandwich*, 30 U. C. R. 269; *Smith v. The Methodist Church*, 16 O. R. 199; *Butland v. Gillespie*, 16 O. R. 486; *Tyrrell v. Senior*, 20 A. R. 156.

Armour, Q. C., in reply.

March 3rd, 1894. STREET, J. :—

The corporate name of the Bishop of the Diocese of Toronto in communion with the Church of Rome is "The Roman Catholic Episcopal Corporation for the Diocese of Toronto in Canada": 8 Vic. c. 82 (C.).

The corporate name of the Bishop of the Diocese of Hamilton is similar, substituting "Hamilton" for "Toronto," and "in Ontario" for "in Canada": 40 Vic. c. 58 (O.).

The bequests in the will here in question are to "the Archbishop of the Diocese of Toronto," and to "the Bishop of the Diocese of Hamilton," and the names under which these bequests are given being essentially different from those of the corporations which they respectively compose and represent. I see no reason for holding that the bequests are to the corporations, and I am of opinion that they must be treated as intended for the individuals answering to the description contained in the will. I must, however, upon the authorities and the terms of the will, hold that the bequests are subject to a trust that the money shall be applied for the purpose mentioned, that is to say, for the education of young men for the priesthood.

I think the case of *The Attorney-General v. Gladstone*, 13 Sim. 7, is authority for the position that the words used here are sufficient to raise a trust, and also that the purpose for which the legacies are given, is a

charitable use. The money being admittedly to be derived from the sale of land, the case is brought within the express provisions of 9 Geo. II., ch. 36, and the legacies must therefore fail.

Judgment.

Street, J.

The next question is, whether the money which the testator directed to be applied in paying these two legacies ought to go to augment the general residue of the estate, or to augment the residuary gift of the particular fund out of which it is directed to be paid.

I am of opinion that the residue of the specific fund, and not the general residue, must have the benefit of the legacies which are declared invalid: *Aston v. Wood*, 43 L. J. Ch. 715; *DeTrafford v. Tempest*, 21 Beav. 564.

This construction is strengthened by the fact that the proceeds of the sale of the land were necessarily uncertain in amount, so that the gift of the residue of the fund could not be treated as a specific legacy: *Ensum v. Appleford*, 5 My. & Cr. 56; *Pape v. Leapingwell*, 18 Ves. 463; *Fee v. McManus*, 15 L. R. Ir. 31.

The residue of the proceeds of the sale of the land after payment of the valid legacies payable out of it will be divided in the proportion of \$15 to Alice Lynch, and \$8 to Mary Lynch.

The testator directs that the land out of which these legacies are to be paid, is to be sold within three years from his death; the legacies should bear interest from the date when the land should, under the terms of the will, have been sold: *Turner v. Buck*, L. R. 18 Eq. 301.

There is no special devise of the real estate, but only a direction to the executor to sell it within three years, and to pay certain legacies out of it. Under these circumstances, the land and the rents arising from it until a sale is effected, belong to the widow under the general residuary gift to her of all the estate not otherwise disposed of: *Ackers v. Phipps*, 3 Cl. & F. 665; and the executor has no power to lease the land, because he has no estate in it, but only a power of sale.

I do not find in the will anything requiring the widow to

Judgment. elect between her dower in the real estate and the benefits
Street, J. conferred on her by it. See *Beilstein v. Beilstein*, 27 Gr. 41.

The plaintiff asks that the property in question may be sold under the direction of the Court, by reason of the difficulty of effecting a private sale, and the present uncertainty as to the actual value of it. None of the parties interested object to this course being taken. There will, therefore, be an order for sale under the direction of the Master at Barrie.

The present litigation is entirely connected with those provisions of the will relating to the land; and the costs should, therefore, come out of the proceeds of the sale of the land, and should be apportioned in the following manner. The costs of the reference and sale are first to be deducted; then the balance of the proceeds of sale is to be apportioned amongst the widow in respect of her dower and as a legatee, and the other legatees, and each share (including the shares of those taking the residue), is to be charged with a proportionate part of the whole of the remaining costs of the parties to the action; and the balance of each share is to be carried to the credit of the person entitled.

The share in which the infants are concerned, must remain in Court; and the interest upon it be paid to Alice Lynch during her lifetime. The reference to the Master should include a reference as to the share of each person entitled.

G. A. B.

[CHANCERY DIVISION.]

SUMMERS V. BEARD, ET AL.

Lien—Mechanics' Lien—Registration of Lien—Time for—Alterations to Work subsequent to Completion.

A lien was claimed for certain steel work done on a building which had been completed by September 30th, 1893, with the exception of the cutting down of certain bolts which it was afterwards found projected out of the walls too far, and which was done between October 17th, and October 25th, 1893. The lien was registered on November 17th, 1893 :—

Held, upon the authority of *Neill v. Carroll*, which is incorrectly reported in 28 Grant 339, that the lien was registered too late, since the time should have been computed from September 30th, and was not extended by the alterations to the bolts.

THIS was an appeal from the certificate of the Master in Statement. Ordinary, made herein on December 22nd, 1893, in respect to a claim made by the Dominion Bridge Company in these proceedings, which were under the Mechanics' Lien Act, 1890, for a lien upon the estate or interest of the defendants, or some of them, in certain lands in respect to certain steel work done upon a building on the lands, including bolts, etc., under a contract of September 8th, 1892. It did not appear from the lien as registered nor as set out in the statement of claim in this action that any of the work had been done after June 30th, 1893, but it was shewn in evidence that some further extra work was done by the claimant as late as September 18th or 20th, 1893, and that, after that, some slight alterations had to be made, at the instigation of the architect, in respect to certain bolts, which it was found projected out of the walls too far and had to be cut down. The architect had called the attention of the Dominion Bridge Company to this defect on October 17th, 1893, and between that and October 25th, 1893, the bolts were cut down. The claim of lien was registered in the proper Registry Office on November 17th, 1893. By his certificate, now appealed from, the Master in Ordinary found the Dominion Bridge Company entitled to a lien in respect to the above work, amounting with costs to \$220.82.

Statement.

The defendant Beard now appealed from the certificate on the ground that the claim of lien of the Bridge Company was filed and registered after the expiration of the time limited by the statutes in that behalf, and that the work done in respect of the bolts was merely a correction of defects in work and did not extend the time for filing a lien. The appeal was argued on February 13th, 1894, before FALCONBRIDGE, J.

Hoyles, Q. C., for the appellant, relied upon *Neill v. Carroll*, which he stated was wrongly reported in 28 Gr. 339.

Mulvey, for the Dominion Bridge Company, contended that the alterations in respect to the bolts extended the time for registering a lien for thirty days more from October 25th, 1893, and relied on *Neill v. Carroll*, as reported.

February 13th, 1894. FALCONBRIDGE, J.:—

I am satisfied, from the judgment of Proudfoot, V. C., which has been produced from the note made in the Registrar's book, that the report of rehearing of the case of *Neill v. Carroll* (a) is erroneous, and that the effect of the judgment is correctly stated in Holmsted's Mechanics' Lien Act, at p. 78. That being so, I am of opinion that, in accordance with what appears to have been the actual judgment of the Court in that case, I must hold that the repairs to the work done in the present case did not have the effect of extending the time for registering or enforcing the lien. As the Master may very reasonably have been misled by the report of *Neill v. Carroll*, while I allow the appeal I do so without costs.

A. H. F. L.

(a) The report in this case as it appears in 28 Grant 339, is incorrect, inasmuch as it speaks of the judgment of Blake, V. C., as the judgment of the Court, whereas it was in reality a dissenting judgment. Blake, V. C., stated that he was authorized by Spragge, C., to say that he retained the opinion expressed by him on the original hearing; and the following judgment was delivered by Proudfoot, V. C.

April 19th, 1881. PROUDFOOT, V. C. :—

Judgment.

Proudfoot,
V.C.

I think the decree of the Chancellor should be confirmed. I agree with the judgment of the Chancellor that the machinery was furnished and placed within the meaning of the statute in September, and that the time for registering the lien should date from that period, and not from the time when a few brasses were supplied to replace others that did not work smoothly. I am not satisfied with the evidence, that when given a note for the price Carroll made it subject to a condition depending upon supplying new brasses. I agree also in the judgment of my brother Blake, that this suit was not brought within the proper time.

REP.

[CHANCERY DIVISION.]

CONFEDERATION LIFE ASSOCIATION V. CORPORATION OF
THE CITY OF TORONTO.

Assessment and Taxes—Insurance Company—Reserve Fund—Interest on Investments of—55 Vict. ch. 48, sec. 34; ib. sec. 2, sub-sec. 10 (O.).

Where the County Court Judge had decided, on appeal from the Court of Revision, that the plaintiffs were liable under sec. 34, and sec. 2, sub-sec. 10, of the Consolidated Assessment Act, 55 Vict. ch. 48, to be assessed upon the interest arising upon investments of their reserve fund, although such interest was always added to that fund and re-invested as part of it, and the plaintiffs now brought this action to have the assessment declared illegal :—

Held, that although the plaintiffs were bound by law to keep up the reserve fund upon a certain scale, the amount varying according to the values of the lives insured by them, as fixed by actuaries' tables, yet they were not bound to apply the income arising from the investments of the fund in keeping the fund at its proper level, but might make the necessary increase with any money whatever, and the Judge of the County Court had full jurisdiction, and the matter was, therefore, *res judicata*.

THIS action was brought to have a certain assessment **Statement.** declared illegal and for repayment by the defendants, under circumstances which are fully stated in the judgment.

The action was tried on November 9th, 1893, before
FERGUSON, J.

Argument.

S. H. Blake, Q. C., and Snow, for the plaintiffs. This reserved fund is by law eliminated and set apart for public safety, and is not income of the company. Income means the balance of gains over losses during the year. This fund is only the equivalent of the debt to be discharged, and which will certainly have to be discharged: *Bain v. The Aetna Life Ins. Co.*, 20 O. R. 6. It represents an exemption, because it is taken away by law from the plaintiffs. The fund being appropriated by law, the County Court Judge had no jurisdiction to deal with it. We refer to *London Mutual Ins. Co. v. City of London*, 15 A. R. 629; *Great Western R. W. Co. v. Rouse*, 15 U. C. R. 168; *In re North of Scotland Canadian Mortgage Co.*, 31 C. P. 552; 34 Vict. ch. 54 (D.); R. S. C. ch. 124, sec. 25.

Biggar, Q. C., for the defendants. I refer to *London Mutual Ins. Co. v. City of London*, 11 O. R. 592, 15 A. R. 629; *The Niagara Falls Suspension Bridge Co. v. Gardner*, 29 U. C. R. 194; *Nickle v. Douglas*, 35 U. C. R. 126, 37 U. C. R. 51; R. S. O. ch. 193, secs. 31 and 34; *Harrison & Joseph's Municipal Manual*, 5th ed., pp. 742, 887. The plaintiffs' argument amounts to saying that the "gross income" cannot be taxed, because there are certain debts to be paid out of it before there is any net income. This is fallacious: *Clerical, Medical and General Life Ass. Co. v. Carter*, 21 Q. B. D. 339. A future contingent liability cannot be a loss. All the Insurance Act requires is, that the company must keep a sufficient fund. On the plaintiffs' argument premiums are not income.

Blake, in reply. *London Mutual Ins. Co. v. City of London*, 15 A. R. 629, seems to be the leading case on the subject and the nearest in point. This is a fund required by law to be kept for a particular purpose. No language in the Assessment Act covers it. *The Niagara Falls Case* does not accord with the other cases. This is an outside insurance fund of the company, earmarked for a purpose. It does not come in as income, and could not go out as income: *Seragg v. The Corporation of the City of London*, 26 U. C. R. 263; *City of Kingston v. Canada Life Ass. Co.*, 19 O. R. 453.

February 14th, 1894. FERGUSON, J. :—

Judgment.

Ferguson, J.

The plaintiffs say that by their charter—34 Vict. ch. 54—they became and still are a duly incorporated Life Insurance Association, having their head office in Toronto; that under their Act of incorporation they carry on the general business of life insurance throughout the Dominion of Canada, and have branch offices in every town and city of importance in the Dominion, and likewise a head office in each of the several Provinces of the Dominion; and that they have issued policies to persons residing in different parts of the Dominion, adding that they are an “Incorporated Corporation.”

They say that for the year 1892, the defendants illegally assessed them (the plaintiffs) in respect of alleged “personal property or income,” in the sum of \$153,000. They do not, in their pleading, say what was or is the character of this sum of money for which they were assessed, but they do say that it was not personal property or income, and was not liable to assessment within the meaning of the Consolidated Assessment Act, 1892, (55 Vict. ch. 48). They say that the taxes on this sum amounted to the sum of \$2,619.44, and that in the month of September last they paid this sum under pressure and protest.

The plaintiffs ask that this assessment may be declared to be illegal. They claim to recover back this sum from the defendants with interest thereon, general relief and the costs of the action.

The defendants admit that in and for the year 1892, they assessed the plaintiffs in respect of taxable income in Toronto, at the sum of \$150,000; that pursuant to the statute, the plaintiffs duly appealed against this assessment to the Court of Revision which confirmed the same; that the plaintiffs thereupon appealed from the Court of Revision to the Judge of the County Court of the county of York, who, after hearing the appeal, increased the assessment to the sum of \$168,000; and that the assessment rolls of the municipality were accordingly amended pursuant to the provisions of the statute in that behalf.

Judgment. The defendants then say that the decision and judgment
Ferguson, J. of the Judge, and the roll as finally passed by the Court
of Revision and amended on appeal, are valid and binding
on the plaintiffs and the defendants.

For the purposes of this action, it is admitted in writing that the plaintiffs were assessed by the defendants in the year 1892, for the year 1893, for the sum of \$150,000, alleged to be in respect of taxable income for said year; that there was the appeal by the plaintiffs to the Court of Revision, which was dismissed and the assessment confirmed; that there was then the appeal by the plaintiffs to the Judge of the County Court, who, after hearing argument, increased the assessment to the sum of \$168,000; and that the taxes upon this sum were paid under protest. It is also admitted that one of the grounds of the plaintiffs' appeal to the County Court Judge, was that the assessment over and above the sum of \$15,000 was illegal, or was upon property not assessable under the Act. The admission also refers to the judgment of the learned Judge upon the appeal reported at p. 151 of the Canada Law Journal of March 1st, 1893, vol. 29.

The difficulty between the parties appears to arise by reason of the allowance by the learned County Court Judge of the sum of \$161,278, interest on investments as "assessable income."

At the trial before me, the plaintiffs called as a witness, Mr. Wm. C. McDonald, their actuary, who said that his duty was, amongst other things, to investigate the "values of the lives." That there exists a system by which such value is ascertained, and that he follows this system. He said that at the end of one year, 1891, the plaintiffs' reserve fund was \$3,226,467; that this fund was for the purpose of enabling the plaintiffs to meet their liabilities upon the lives insured by them as they might fall in; that the plaintiffs were and are not at liberty to take any of this reserve fund for any purpose other than to answer the death claims; and that under the insurance laws the plaintiffs were compelled to have this fund, the amount being

ascertained by calculations and computations, reference being had to the tables formulated on the subject of the duration of human life. He said that the reserve fund for 1891 would not answer for 1892, because each policy holder would be one year older and one year nearer the time of the death claim being made; and that under and according to the tables, the plaintiffs would require to have a larger sum year after year, and that for the purpose of effecting the necessary increase of this fund, the plaintiffs add to it the earnings of the fund each year. He further said that the government superintendent requires the increase of this fund; and that in theory both he and the plaintiffs embrace in the calculations as to such increase, the earnings of this fund, as, at least, an element producing the required increase; and that the fund is sacredly set apart for the purposes aforesaid and none other. And the witness said that the learned Judge of the County Court in settling the assessment, included under "interest on investments," the interest arising upon the amount of this reserve fund, about three and one-quarter millions of dollars.

This reserve fund is kept invested in mortgages, debentures, and other securities; and the contention of the plaintiffs is, that the interest arising from it is not "income" within the meaning of the Assessment Act, and not property that is taxable or assessable.

The witness said that the plaintiffs have two branches of their business, the joint stock branch, and the mutual branch; that what they thought they were assessable for, was simply the dividends paid to shareholders, amounting to \$15,000.00 last year, and that these dividends would be payable out of the joint stock branch. He says that in the stock branch the profits arising go to the stockholders; but in the mutual branch, the profits go to the benefit of the policy holders; and he says that the reason the plaintiffs admit the liability to be assessed upon the \$15,000 is, that the stock holders expect not only interest on their money put in, but also profits arising out of the non-par-

Judgment.
Ferguson, J.

Judgment. ticipating branch ; and that they are also entitled to a
Ferguson, J. small percentage out of the other branch of the business.

The plaintiffs contend that there should be no assessment upon the interest arising on the investments of the reserve fund ; and the witness says that this contention was made before the learned Judge of the County Court on the appeal before him.

An argument held for the plaintiffs before me was this : That, inasmuch as the interest arising upon the investments of this reserve fund is a fund appropriated by law, to a certain purpose, namely, the necessary and required increase from year to year of the reserve fund itself, the learned Judge of the County Court had no jurisdiction to deal with it or the assessment respecting it ; and that for this reason the matter before me is not *res judicata*.

It seems to me that this argument borrows, or borrows in part, the proposition on which it is founded. I do not see that the interest arising upon the investments of the reserve fund is appropriated by law to the purposes of the necessary increase of the fund. The farthest the evidence goes, is to shew that this interest is so applied by the plaintiffs, that the government superintendent requires the increase of the reserve fund, and that both he and the plaintiffs in theory embrace in the calculations as to such increase, the earnings of the fund as at least an element in producing the required increase ; and, although I have no doubt that, as stated by the witness, the reserve fund is sacredly set apart for the purposes mentioned, I do not see, nor does it any where appear before me, that by law the interest arising upon the investment of it, must be appropriated to the purpose of its increase.

The plaintiffs are, no doubt, required to have this reserve fund, to keep it up and increase it year by year. The necessary increase from time to time, so far as I am able to see, might be made with any moneys whatever. The plaintiffs are only required to have the reserved fund of a certain amount to be ascertained from time to time by calculations ; and if they have that fund made up of

moneys from any source that must be satisfactory. They ^{Judgment.} are not obliged by law, when they receive interest arising ^{Ferguson, J.} upon investments of the fund, or parts of it, to apply such interest directly to the increase of the fund, however proper and commendable it would be so to do.

Then looking at the subject in this way, which, I think, is the true way, the appropriation of the interest arising upon the investments of the fund to its increase, is but a method, a commendable method, approved of by the government superintendent, of operating, or operating in part, the required increase of the fund.

Then assuming this to be so, the interest arising upon the investments of this reserve fund, being received by the plaintiffs, is received by them as any other interest on investments would be received, though they wisely and prudently appropriate it to the required increase or increase *pro tanto* of the fund itself.

After having examined the authorities referred to on the argument, the charter of the plaintiff and the statutes bearing on the subject, I am not prepared to say that the interest as to which the contention is, is not in its nature, "income," although applied for the purpose of increasing and maintaining a fund that will be necessary for the payment of demands, that must certainly be made and paid.

After having given the case the best consideration I can, and after having consulted the cases and authorities referred to, I am of the opinion that this is a matter in which the learned Judge of the County Court had on the appeal before him, full jurisdiction, and this being so, his decision is final and conclusive. The matter as stated in the defence, is *res adjudicata*.

The action should, I think, be dismissed with costs.

Action dismissed with costs.

[CHANCERY DIVISION.]

WARD V. ARCHER.

Execution—Fi. fa. Lands—Specific Performance—Equitable Interest of Purchaser under Contract—Judgment against Assignee of such Purchaser—R. S. O. ch. 64, sec. 25.

The equitable interest of an assignee from the purchaser under a contract for the sale of lands, is exigible under a writ of *fi. fa.* against the lands of such assignee, and the purchaser at a sheriff's sale of such interest, is entitled to specific performance of the contract.

Re Prittie & Crawford, 9 C. L. T. 45, declared to have been inadvertently decided or reported.

Statement. THIS was a demurrer to a statement of claim in an action for specific performance. The statement of claim alleged that in 1888 the defendant agreed to sell and one Patrick McDonald agreed to buy certain lands, which agreement was the same year assigned by the latter to one Ephraim Salisbury, who made certain payments on account of purchase money: that the plaintiff had purchased all the right, title, and interest of the said Ephraim Salisbury in the said lands at an execution sale held by the sheriff of the county of Simcoe, in an action wherein Ephraim Salisbury was defendant: that after the said purchase the plaintiff had tendered the defendant the full balance of the purchase money, and offered to complete the agreement, but the defendant had declined and refused to do so.

In a statement of defence and demurrer the defendant denied that Ephraim Salisbury ever had an interest in the said lands which could be attached or sold under a *fi. fa.* against his lands, and he demurred to the statement of claim on the ground that the above facts alleged therein shewed that Ephraim Salisbury had no interest or estate in the lands that could be seized or sold under execution.

The demurrer was argued before FALCONBRIDGE, J., on February 15th, 1894.

H. H. Strathy, Q. C., for the demurrer. A vendee under contract of purchase has no legal title in the lands but only a right to compel a conveyance. Such an estate could only have been the subject of equitable execution before the Administration of Justice Act, R. S. O. 1877, ch. 49, sec. 11, which is virtually incorporated in Rule 1008: See *Holmested & Langton*, Judicature Act and Rules, p. 748; R. S. O. 1887, ch. 64, sec. 22; *ib.* ch. 100, sec. 9; R. S. O. 1877, ch. 66, sec. 39. Under Imp. 5 Geo. II., ch. 7, real estate in the colonies could be sold in like manner as goods and chattels for the payment of debts, yet in *Simpson v. Smyth*, 1 E. & A. at p. 42-6, *Robinson, C. J.*, held that an equity of redemption could not be sold. In *Peters v. Stoness*, 13 P. R. 235, where an application was made under Rule 1008 in a case where the judgment debtor was a purchaser under contract of sale, a reference was directed to ascertain what interest he had. See also *Johnson v. Bennett*, 9 P. R. 337; *Kerr v. Styles*, 26 Gr. 309; *Re Prittie & Crawford*, 9 C. L. T. 45, which last case it is submitted, though it has been questioned and is not fully reported, is well decided.

Pepler, Q. C., contra. Assuming that the law, as laid down in *Leith's Real Property Statutes*, at p. 314, and in *Henrihan v. Gallagher*, 9 Gr. 488, and 2 E. & A. 338, and *Parke v. Riley*, 12 Gr. 69, and 3 E. & A. 215 (there cited), was then sound, and assuming that the interest in land, the subject matter of this action did not come within the meaning of 14 & 15 Vict. ch. 7, secs. 5 and 9 (C. S. U. C. ch. 90, secs. 5 and 11), still, by the statutory amendment, 40 Vict. ch. 8, sec. 37, now incorporated in R. S. O. ch. 64, sec. 25, this interest is covered, and can be sold under execution. This last amendment is practically the same as the wording of 13 & 14 Vict. ch. 63, authorizing the registration of judgments, which had "the widest effect in binding every species of interest of the judgment debtor, over which he had any disposing power which he might, without the assent of any other person, exercise for his own benefit:" *Leith's Real Property Statutes*, at pp. 316-17, and under

Argument. this statute such an interest was bound by registration but could not be sold without resort to equity; *ib.* p. 317. The subsequent superaddition of the above provision, therefore, to those of 14 & 15 Vict. now not only binds the land, but enables the sale to take place. The only case directly in point since this amendment is *Re Prittie & Crawford*, 9 C. L. T. 45. This was merely an application under the Vendors and Purchasers' Act, and was apparently not fully argued or considered, and has not got into the regular reports: see 25 C. L. J. at pp. 65-6. *Re Lewis & Thorne*, 14 O. R. 133, was also a similar application, and at any rate it was a case of trust, and, therefore, not within the above wording, "for his own benefit," etc. The sale of a subequity of redemption, (see *Samis v. Ireland*, 4 A. R. 118,) stands on a different footing, and is covered by the express provisions of R. S. O. ch. 64, secs. 21-2, and the case *Rumohr v. Marx*, 3 O. R. 167, is distinguishable. It merely decided that a sheriff is confined in the case of a mortgagee's interest to sue on the mortgage, as provided by sec. 17, R. S. O. ch. 64, and cannot sell the mortgage.

February 21st, 1894. FALCONBRIDGE, J.:—

I am authorized by the learned Judge who is said to have decided *Re Prittie & Crawford*, 9 C. L. T. 45, to state that that case was inadvertently decided or reported.

The statute is wide enough to cover the case in hand.

I give judgment for the plaintiff on the demurrer with costs.

A. H. F. L.

[CHANCERY DIVISION.]

MEHR V. McNAB.

Landlord and Tenant—Endorsement on Lease to Lease other Premises at the same Rent—Construction of—Negligence—Fall of Verandah—Liability of Landlord to Daughter of Tenant—Member of Family—Stranger.

A lessee of house No. 107, signed an endorsement on the lease that he would lease house No. 109 at the same rent, he getting possession as soon as the premises were vacated by the then tenants, which endorsement, however, was not signed by the lessor :—

Held, that from the time of his getting possession of No. 109, the lessee held it on the same terms as No. 107, and all the terms and covenants in the lease of the latter, barring the time of getting possession and the consequent difference in the length of the terms, applied to the letting of No. 109.

The lessee had covenanted with the lessor to keep the premises in repair, and his daughter, living with him at the time of the accident, was injured by the fall of a verandah attached to the building :—

Held, that the daughter had no right of action for damages on account of the accident against the lessor, nor could she be considered as standing in the position of a stranger.

THIS was an action for damages brought by Ida Mehr, Statement.
an infant, by her father, Jacob Mehr, as next friend, against the lessor of certain premises known as 109 Richmond street west, for that on June 25th, 1893, while the said premises were under lease to Jacob Mehr, a platform or annex being part of the buildings on the premises, gave way owing to its negligent and unsafe condition and construction while the plaintiff was walking thereon, in consequence of which she fell and broke her leg and received other severe injuries; and, as the plaintiff alleged in the statement of claim, the defendant had “agreed with Jacob Mehr to do all repairs necessary to the said platform or annex, but the said defendant did negligently and carelessly neglect his duty in the premises to the said Ida Mehr, so that she, the said Ida Mehr, suffered the injuries aforesaid.”

In a statement of defence the defendant admitted the lease, but alleged that in it Jacob Mehr had covenanted to repair and keep in repair during the currency thereof, and

Statement. that he was by such covenant bound to repair the platform in question, and if it was out of repair it was through the fault and neglect of the said Jacob Mehr, and not through that of the defendant as to parol evidence of a contract to repair.

The action was tried before FALCONBRIDGE, J., and a jury at the Toronto Autumn Assizes, 1893, and resulted in a verdict for \$300 for the plaintiff.

The remaining facts of the case are sufficiently set out in the judgment of FERGUSON, J.

The defendant now moved before the Divisional Court against the verdict, and to enter a non-suit or judgment for the defendant, and the motion was argued on February 21st, 1894, before BOYD, C., and FERGUSON and ROBERTSON, J. J.

English, for the motion. The defendant can only be held liable if he was directly personally responsible for the injury, or if the plaintiff can establish such a position as would cast on him a duty to warrant from accident such as this. He was not given notice of any disrepair, or been called on to repair. Even if a landlord habitually look after repairs, it is purely voluntary on his part. He is under no duty: *Brown v. The Trustees of the Toronto General Hospital*, 23 O. R. 599. There, however, there was an unquestioned covenant to repair, and notice of want of repair, neither of which exist here.

Johnston, Q. C., for the plaintiff. This action is not between landlord and tenant at all, it is brought by a stranger against the landlord by reason of his having premises in an unsafe condition, when we say it was his duty to have them in a safe condition. Different considerations apply. The plaintiff was not a party to the contract between Mehr and his landlord, McNab: Woodfall's *Landlord and Tenant*, 15th ed., p. 775. The landlord was bound when he let the premises to see the premises were

in a safe condition. The plaintiff was there by invitation Argument.
of the sub-tenant of Mr. Mehr.

[BOYD, C.—Do you find any authority that a member of a family of one who has contracted to repair is in the position of a stranger. Is a member of the family a stranger *quoad* the landlord ?]

I have not the case of a member of a family. There is no privity between her and the landlord, no contractual relation: *Mills v. Temple-West*, 1 Times L. R. 503; *Todd v. Flight*, 9 C. B. N. S. 377; *Nelson v. The Liverpool Brewery Co.*, 2 C. P. D. 311; *Payne v. Rogers*, 2 H. Bl. 349. When the landlord let the premises he impliedly undertook that they were in a fit condition for use: *Heaven v. Pender*, 11 Q. B. D. 503.

English, in reply. There is no implied obligation on the landlord's part to warrant the premises in a proper condition for use: Woodfall's Landlord and Tenant, 15th ed., p. 623; *Denison v. Nation*, 21 U. C. R. 57. As to the rights of a stranger, even if an express contract had existed to repair in this case, the landlord would not be liable here: *Arnold v. Clark*, 45 N. Y. S. C. 252.

February 22nd, 1894. FERGUSON, J.:—

I am of the opinion that parol evidence should not have been received for the purpose of shewing that the lessor was bound to keep the house, number 109, in repair. The house, number 107, was leased by an indenture of demise, a document drawn in pursuance of the Act respecting short forms of leases. This was signed by the lessee and contains a covenant by him to repair and keep this house, number 107, in repair. On this document is written a memorandum, made at, or about the time the lease was executed, signed by the lessee, by which he agrees to lease the house, number 109, also at \$8.50 per month, the same rent that he was to pay for 107, he to get the possession of 109 as soon as the lessor should get the possession from the then tenants whom the lessor was intending to be rid of.

Judgment.

Looking at the lease of 107 and this memorandum endorsed upon it, it is most difficult to escape from the conclusion that the real meaning and intention were that the lessee having first leased 107 on the terms contained in the lease, he would also lease 109 on the same terms and receive possession of it as soon as the lessor could get possession from the then tenants. It matters not in arriving at this conclusion that the possession could not be given immediately, so that the term would be of the same length as the term for which 107 had just been leased, as I think the statement as to the possession amounts to saying that the lessee would take 109 for such part of the same term as should remain after the lessor should be able to give him possession after getting the then tenants out.

Pursuant to the provisions of this memorandum, the lessee did go into possession of 109 and I am of the opinion that from the time of his getting this possession of 109, he held 107 and 109 on the same terms.

In the effort to discover what was meant by the memorandum, one is at liberty to avail himself of the light cast by all the surrounding circumstances, all the facts that were before the minds of the parties at the time. They had just completed the lease of 107, and, the lessee, by this memorandum, said, that he would "also" lease 109 at \$8.50 a month, and be satisfied with getting possession, as stated in the memorandum. But for 109 being in the possession of the then tenant, it seems to me that it would have been leased in the same way as was 107, and that the only thing that prevented it was the fact that the lessor could not give immediate possession of it.

In respect of repairs, what appears, as I think, is that the lessee was to keep both houses in repair; that all the terms and covenants in the lease of 107, barring the time of getting possession, and the consequent and necessary difference in the length of the terms, applied to the letting of 109.

This memorandum was put in by the plaintiff (her next friend in the action being the lessee himself), for the pur-

pose, amongst others, of shewing so far as the same would go, the terms of the letting of 109, and in the circumstances, it does not, as I think, make any difference that it is not signed by the lessor. I am of the opinion that upon this record there cannot be a recovery against the defendant, on the ground of his having let and leased premises that were in a dangerous condition, even if it were shewn by the evidence (and I think it was not), that the house, number 109, was in such condition when let by the defendant.

It had to be conceded, and the authorities shew, that even if the lessor was the one who had to do the repairs, and the accident had happened to the lessee himself, he could not sustain an action against the lessor for damages of the character of the damages claimed here. The plaintiff is a daughter of the lessee, who is her next friend, by whom she sues in this action, she was a member of his family and living with the lessee at the time of the accident, and I do not see how she can be considered a "stranger," as was contended.

As, however, the lessee, and not the defendant, was the one who was, as I think, obliged to repair the premises, and keep them in repair, and, as there could not, in my view, be a recovery against the defendant, based upon the proposition that he had leased the premises so out of repair as to be in a dangerous condition, I am of the opinion that the action cannot be sustained, and, I think, the verdict should be set aside, and a nonsuit entered. If necessary to say so, *with costs to the defendant*.

BOYD, C., and ROBERTSON, J., concurred.

A. H. F. L.

[CHANCERY DIVISION.]

EMPEY V. CARSCALLEN.

*Trial—Defendants' Right of Challenge—Defending Separately—Mistrial—
R. S. O. ch. 52, sec. 110.*

The defendants having delivered separate defences and being separately represented at the trial, claimed to be entitled under the Jurors Act, R. S. O. ch. 52, sec. 110, to four peremptory challenges each, which, though objected to by the plaintiff, was conceded by the Judge, and the defendants challenged six jurors between them, and the trial proceeded resulting in a verdict for the defendants:—

Held, upon motion by the plaintiff, that there had been mistrial, and the plaintiff was entitled to a new trial.

Under the above section, the defendants were only entitled to four peremptory challenges between them, and, inasmuch as the plaintiff took the objection at the time, he had not waived his right to complain by proceeding with the trial.

Statement.

THIS was a motion for a new trial in an action which was tried before ROSE, J., and a jury at Napanee, on October 18th, 1893.

It was brought by the executor of the will of Edward Sheehan against a married couple to recover possession of two promissory notes and a deposit receipt.

The defendants though sued jointly, defended separately, and were represented by different counsel at the trial, and on the swearing of the jury claimed each to have the right to challenge four jurymen. This contention was opposed by the plaintiff's counsel, but upheld by the Judge, and six jurors were challenged by the defendants.

The plaintiff moved before BOYD, C., and FERGUSON and ROBERTSON, JJ., for a new trial on February 20-1, 1894.

Aylesworth, Q. C., for the plaintiff. The defendants had only one right of challenge between them: R. S. O. ch. 52, sec. 110. The Judge refused to allow a double right of cross-examination, or a double right of reply. Had there been a real and not a pretended severance, still they would not have had a double right of challenge. It was necessarily an unfair trial.

[BOYD, C.—In a criminal case it would have a serious effect no doubt.]

The rule is just the same in a civil case: *Whelan v. The Queen*, 28 U. C. R. 1; *Regina v. Kerr*, 26 C. P. 214. I have not found a case where a Judge has allowed too many challenges as here.

[FERGUSON, J.—I suppose it is impossible to say whether any harm arose or not.]

Yes, it is.

Clute, Q. C., and *A. L. Morden*, for the defendants. As to the question of challenge, we refer to Thompson and Merriam on Juries, sec. 251, p. 268; *ib.* sec. 271, p. 299; *Mansell v. The Queen*, 8 E. & B. 54, 79. The plaintiff took his chances, by going on and giving his evidence: *Denmark v. McConaghy*, 29 C. P. at p. 566; *Widder v. Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 520, at pp. 533-4, and *Ham v. Lasher*, see footnote as to last case at p. 533; *Regina v. Smith*, 38 U. C. R. at p. 233. Besides before there was a legislative right of peremptory challenge at all, the Judge used often in his discretion to tell a man to step aside at counsel's request. This discretion was not taken away when the legislative right was given: *Creed v. Fisher*, 9 Exch. at p. 474. It is not a case for granting a new trial: *Goose v. Grand Trunk R. W. Co.*, 17 O. R. 721; *Wood v. McPherson*, *ib.* p. 163; *Hill v. Yates*, 12 East 229.

[FERGUSON, J.—I think the day has gone past for a Judge to exercise any discretion in the matter of challenging. The legislature has taken it in hand. What we have in this case is a ruling on the law.]

Then we rely on the waiver by going on.

[ROBERTSON, J.—Counsel was bound to go on. I don't think in these days a counsel should have walked out of Court, and left his client to the mercy of the other side.]

If counsel for the objecting party has knowledge of the irregularity and then goes on and takes his chances he cannot complain: *The Earl of Fulmouth v. Roberts*, 9 M. & W. 469.

[FERGUSON, J.—In that case no objection was taken before the Court.]

Aylesworth, in reply. As to the challenging of the jury,

Argument. the statute law regulates it. It is not every person who is entitled to be upon the jury panel. The law is more than merely directory as to how the jury is to be struck. The right to eight challenges has not been argued for here ; but an effort is made to hold the advantage to which the defendants were not entitled. Our Courts have decided that one wrong challenge is mistrial: *Whelan v. The Queen*, 28 U. C. R. 1. We are not prejudiced by having gone on. We protested against the right of separate challenge as much as we could. When the objection is one which if taken would have been acceded to, then a party cannot go on and take his chances and then ask relief from an appellate Court. Such a case was *Ham v. Lasher* above referred to. In *Widder v. Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 520, the objection was not taken. None of the cases cited are cases where the Court overruled objection taken.

February 22, 1894. FERGUSON, J. :—

In this case I do not see the necessity of considering any of the many subjects that were argued excepting the one respecting the ruling of the learned Judge regarding the challenges of jurors.

This ruling was that each of the two defendants was entitled to challenge, peremptorily, four jurors, and the defendants availed themselves of the ruling to the extent of peremptorily challenging between them jurors to the number of six. It was not contended that the ruling, as a ruling, was right, or that the defendants were entitled to more than four peremptory challenges between them, that is to say that one side of the case, in this instance the defence, was entitled to more than four peremptory challenges. The provisions of the statute appear to be too plain to admit of such a contention. As to the contention that counsel for the plaintiff had by proceeding with the trial after the ruling waived the objection, it will be found that the cases in which it was held that there had been such a waiver were cases in which the solicitor or counsel

or party complaining had knowledge of the fact of which ^{Judgment} complaint is made, yet did not bring it by way of motion ^{Ferguson, J.} or objection before the Judge at the trial, but, on the contrary, remained silent on the subject, taking his chances of obtaining a verdict in his favour, complaining only after a verdict had been given against him. Here the objection was taken and vigorously urged at the trial, but without success.

What is complained of was not, as was contended before us on the part of the defence, the exercise of a discretion by the learned Judge. It was a ruling upon the law, and is as it seems to me, as much a subject of complaint by way of motion against the verdict as a ruling erroneous in law upon any other subject at a trial. It may be added, if it be considered material, that the case is such that it seems impossible for the Court here to say whether or not wrong resulted from the error. The issues seemed to have been trembling in the balance, everything depending upon the jury.

Looking at the provisions of our statutes respecting the selections of jurors, and the particularity with which, so far as one can see, every step from the commencement down to the drawing of the names of the jurors to try the particular case is provided for, and then the challenges, or rather rights of challenge, and the grievances or supposed grievances intended to be remedied by the enactments, and then looking at what occurred in the present case, I cannot get away from the opinion that the plaintiff has not had his cause tried by a jury in the manner not only contemplated, but provided for by the law. In short, I think there has been a mistrial, and that the verdict should be set aside and a new trial had. The costs of the last trial and of this motion should be, I think, costs in the cause to the plaintiff if he succeeds in the action. The defendants not to have these costs in any event.

BOYD, C., and ROBERTSON, J., concurred.

A. H. F. L.

[COMMON PLEAS DIVISION.]

SIMMONS v. SIMMONS.

*Insurance—Life Insurance—Benevolent Society—Endowment Certificate—
Change of Beneficiary—Evidence of.*

An endowment certificate issued in 1889 by a Benevolent Society to a member, and payable on his death, half to his father and to his mother, contained a provision that should there be any change in the name of the payee, the secretary should be notified, and an endorsement thereof made on the certificate. The member subsequently married, when he informed his wife that he would have the certificate changed as he intended it for her, giving her the certificate which she deposited in a trunk used by both in common, he continuing to pay the premium :—
Held, that this was not sufficient to displace the terms of the contract as manifested on the face of the certificate; and, further, so far as the mother was concerned, she was amply protected, 53 Vic. ch. 39, sec. 5 (O.), which applied to the certificate in question, creating a trust in her favour.

That statute is retrospective as to current policies, issued before it came into force.

Statement.

THIS was an action to recover from the defendants, the father and mother of the plaintiff's husband, the sum of \$1,000, the amount received by them under an endowment certificate issued by the Canadian Order of Foresters on the life of the deceased husband.

The plaintiff claimed that the endowment had been changed, and the amount was payable to her.

The action was tried at Belleville at the Autumn Chancery Sittings of 1893.

Clute, Q. C., and *John Williams* for the plaintiff, referred to *Pfleger v. Browne*, 28 Beav. 391; *North American Life Assurance Co. v. Craigen*, 13 S. C. R. 278; *Lewin on Trusts*, 8th ed., p. 890; *Ramsden v. Dyson*, L. R. 1 H. L. 129, 170; *Plimmer v. Maycr, etc., of Wellington*, 9 App. Cas. 699; *Sanderson v. McKercher*, 13 A. R. 561, 15 S. C. R. 296.

W. B. Northrup for the defendants.

October 27, 1893. BOYD, C. :—

Judgment.

Boyd, C.

An endowment certificate issued by the Canadian Order of Foresters to the deceased, a regular member, providing for payment of \$1,000 on his death, to his mother as to half, and to his father as to the other half. This issued in September, 1889; the death was in 1892, and payment has been made to the persons named. The deceased was married in September, 1890, and afterwards said he would have the designation of the endowment changed as he intended it for his wife, and he gave her the certificate, which she deposited in his trunk, which was used in common by husband and wife. The certificate provides that should any change be decided in the name of the payee, notice of such change must be given to the secretary and endorsed by him on the certificate. This was never attended to by the deceased, but he having paid all the premiums, it is urged that the proceeds of the certificate belong to his estate, and that the father and mother should refund.

The cases cited depend upon a statute not applicable to the insurance of a man's own life by himself, as was decided in *North American Life Assurance Co. v. Craigen*, 13 S. C. R. 278, and have no relevance to the facts of this case. A more helpful case is *Re Richardson*, 47 L. T. N. S. 514, in which the policy was on a man's own life in his daughter's name, but he retained the policy in his own hands, paid the premiums and made no disposition of it by will; and it was held by Kay, J., that the retention of the policy did not shew that the beneficial interest was not intended to pass, and the right of the daughter was held complete.

Nothing is proved in the present case sufficient to displace the terms of the contract manifested upon the face of the certificate, upon which payment has been made by the Foresters. The written contract was to pay the father and mother, unless other names were substituted in the manner mentioned. It would be unwise to give effect

Judgment. to statements of mere intention expressed by the deceased
Boyd, C. not followed up by any decisive action on his part, as
against the plain language of the security held by the
insured, of which, and the effect of which, he was well
informed.

It is also to be noted, as far as the mother is concerned,
she is amply protected by an amendment of the statute re-
specting life insurance: 53 Vic. ch. 39, sec. 5 (O.), whereby
if the mother of insured person is made a beneficiary in
the original contract, a trust is created in her favour. That
enactment is, I think, to be read as applicable to current
policies, though dating back to a period prior to April,
1890, when the law was thus amended.

* * * * *

This judgment will be without costs to or against any
of the parties.

G. F. H.

[COMMON PLEAS DIVISION.]

ALEXANDER V. THE CORPORATION OF THE VILLAGE OF
HUNTSVILLE.

Municipal Corporations—By-law Exempting Manufactory—R. S. O. ch. 184, sec. 366—Right to Repeal—Good Faith—Acquiescence.

A by-law, on the faith of which land had been purchased and a manufactory erected, was passed by a municipal council, under section 366 of the Municipal Act, R. S. O. ch. 184, by which the property was exempted from all taxation, etc., for a period of ten years from the date at which the by-law came into effect.

The council subsequently, within the period of exemption, on the alleged ground that it was "expedient and necessary to promote the interests of the ratepayers," passed another by-law repealing the exempting by-law. The Court being of opinion on the facts, as set out in the case, that the repealing by-law was passed in bad faith, to enable the council to collect taxes upon a property which was exempt under the section, and, in the absence of any forfeiture by the applicant of his rights, quashed the by-law as not within the powers of the council.

In this application a ground relied on by the council was that the applicant had erected more than two dwelling houses on the exempted lands, whereby, under the terms of the by-law, the exemption ceased. This was done through oversight, and on the applicant's attention being called thereto, and on his undertaking to pay taxes thereon, a by-law was passed agreeing thereto and validating the exempting by-law; but, through inadvertence, was not sealed. The dwellings were subsequently assessed, and the taxes paid on them:—

Held, that the corporation by their acts and conduct were precluded from now setting this up as a breach of the by-law.

Seemle, the words "manufacturing establishment" in the exempting by-law included land and everything necessary for the business.

Seemle also, the period of exemption was within the statute.

THIS was a motion to make absolute an order *nisi* to quash by-law No. 89 of the corporation of the village of Huntsville, which repealed by-law No. 62 of the said corporation. The latter by-law was passed to carry out an agreement between one D. W. Alexander and the corporation, whereby he purchased land and erected a tannery in the village under the conditions referred to in the judgment, in which the circumstances which led to the repealing by-law being passed are also set out. Statement

Meredith, Q. C., and J. B. Clarke, Q. C., for the motion.
F. E. Hodgins, contra.

Judgment. January 20, 1894. ROSE, J.:—

Rose, J.

The by-law No. 62, evidences the agreement between the parties founded upon a good consideration, and is not open to the attacks made upon it, which were :

1. That it in terms exempts more than the "manufacturing establishment:" Section 366 of the Municipal Act, R. S. O. ch. 184.

2. That more land than sufficient for the purpose of the establishment was exempted.

There is no motion before me to quash the by-law for obvious reasons; but, even if there was, the objections would not be tenable.

"Manufacturing establishment" must include land and everything necessary for the purposes of the business; and there is no evidence before me to shew that more land than necessary was included in the exempted property. Certainly no fraud, bad faith or indirect motive was proven, as in the cases *Mr. Hodgins* referred to of *Re Denne and Corporation of Peterborough*, 10 O. R. 767; *People's Milling Co. and Council of Meaford*, 10 O. R. 405.

Nor was the exemption for a greater period than permitted by statute. The words are, "not longer than ten years." By the Interpretation Act, ch. 1, sec. 8, sub-sec. 15, "year" means a calendar year.

The by-law exempts for "ten years from the day on which the by-law takes effect."

It is manifest that this would only cover ten annual assessments; and so the exemption would be for not longer than ten years.

I have considered these objections without regard to the mode of raising them, as it seems to me desirable, if possible, to put an end to the litigation or disputes between the parties, if perchance an expression of judicial opinion may tend to such result, which is perhaps very doubtful.

Under the terms of the by-law, the property named in the by-law became exempt "from all taxation, rates, dues,

and assessments of every nature or kind whatsoever from which the said corporation has jurisdiction to exempt the same.”

Judgment.
Rose, J.

A question has arisen between the parties as to whether the property is exempt from taxes for school purposes. I am not called upon to decide the question; but the by-law is not open to attack as being too wide in its terms.

This by-law came into effect on the 9th of June, 1890.

Mr. Alexander expended large sums of money in erecting a tannery, etc., and the by-law was otherwise acted upon until the 28th of April, 1893, when by-law No. 89 was passed repealing it. The repealing by-law on its face exhibits no reason for its being passed, save that it recites that “is believed to be expedient and necessary to promote the interests of the ratepayers.”

This motion is to quash the repealing by-law.

Was the council in passing it acting within its powers and legally? Unless, as is asserted, Mr. Alexander had under the terms of his contract as set out in by-law 62, forfeited his right to exemption, it seems to me that the repealing by-law was not within the powers of the council, that it was passed in bad faith, and to enable the council to collect taxes upon a property which was exempt under section 366 of the statute.

To have attempted to assess the property and collect the taxes under such assessment, after the passing of the exemption by-law, and while it remained in full force, would clearly have been illegal; and to pass a repealing by-law so as to enable such assessment and levy to be made, would be equally illegal.

The statute gave power to exempt for ten years, but once that power had been exercised, it does not seem to me there was any power to repeal the by-law so as to destroy rights granted thereunder: *Wright v. Incorporated Synod, etc., of Huron*, 29 Gr. 348, 11 S. C. R. 95; Harrison's Mun. Manual, 5th ed., p. 211, note *ee*.

There is, I think, power in the Court to entertain this motion and to make the order, if there was no excuse for

Judgment.
Rose, J.

passing the repealing by-law; and I do not stay to determine whether such power be purely statutory or at common law.

I refer specially to the language of Sir J. B. Robinson in *Re Barclay and Municipality of Darlington*, 12 U. C. R. 86, 92; and cited in *Scott v. Corporation of Tilsonburg*, 13 A. R. 233; and to the judgment of the learned Chief Justice of Ontario, in the same case—commencing p. 235. See also cases therein referred to; and *Re Campbell and Village of Lanark*, 20 A. R. 372; *Regina v. Pipe*, 1 O. R. 43; *Re Nasmith and The Corporation of Toronto*, 2 O. R. 192; and the language of Hagarty, C. J., in *Re Great Western R. W. Co. and Corporation of North Cayuga*, 23 C. P. 28, at p. 31.

I now proceed to examine the grounds upon which the repealing by-law was passed. They are, I assume, to be found in the affidavits of the reeve and two of the councillors filed on this motion.

The affidavits raise a question perfectly immaterial, viz., whether the council proposed to Alexander or Alexander to the council, to enter into the contract; and the Reeve's affidavit further sets out the alleged history of the negotiations. This exhausts the first five clauses of the Reeve's affidavit. Clause 6 alleges that "the said Alexander is carrying on, on the exempted property, another business, * * namely, that of producing and selling electric light in Huntsville, and the town of Huntsville is being deprived of its legitimate taxation upon electric light plant and power house, which must otherwise be erected in Huntsville; and the said Alexander is using the advantages derived from the original by-law in breach of his agreement, and to the detriment of the said town of Huntsville."

Clause 10, alleges that "the said Alexander does not require, and does not use all the property exempted under the original by-law for the purposes of a manufacturing establishment."

Clause 12 reads: "With a view to avoid litigation,

the council under a firm belief that they as a municipal council, had no power, and never had any power to exempt said tannery from school taxes, have offered (and are still willing to offer without prejudice to their case), to compromise the matters in question in this action with Mr. Alexander, upon the basis of his paying school taxes and being exempted from all other municipal taxes."

Judgment.

Rose, J.

The affidavit further states that the offer was made by letter to Alexander, but no satisfaction being obtained, the repealing by-law was passed and the assessor instructed to assess the exempted property.

Mr. Alexander by his affidavit denies receiving any such offer, and produces a letter of the 28th of February, 1893, as the only one received. This letter stated that "the council having been advised by counsel that by-law No. 62 granting exemption from taxation to your tannery property is bad, and they propose to instruct the assessor to assess it with all other property in the village; but before doing so, are willing to hear anything you may wish to say in the matter," etc.

Mr. Alexander further states in his affidavit, that the council did not inform him upon what ground they claimed the right to assess his property, but that he was led to believe "that they first contended that the exemption granted could not legally be made to exempt from school taxes, and was, therefore, void; and subsequently that the erection of the said poles and wires, and the supplying of the electric light, was a violation of the terms of said by-law."

The Reeve, by his affidavit, does not in terms state the grounds upon which the right to repeal was based; but he does not set up any further ground unless it be the exemption of too much land.

In addition to what I have already said as to the alleged excess of land, I may add that Mr. Alexander has stated in his affidavit that he requires all the exempted land for the purposes of his business. Certainly, the council cannot be permitted, after entering into the contract on the

Judgment.

Rose, J.

faith of which the land was purchased, to act as judges in their own behalf, and of their own motion rescind such contract on any such alleged ground.

As to the school taxes, section 366, grants the power to exempt "from taxation." The language of the by-law is restricted, as I have above pointed out. If the section did not give power to exempt from taxation for school purposes, all that need be said is that the by-law does not purport to grant such an exemption, its operation being confined to what was within its jurisdiction.

As to the objection that the premises were unfairly being used for purposes other than those for which the exemption was granted, it is necessary to consider the by-law and the evidence.

Reading the enacting clauses of the by-law with the recitals, it is, I think, clear that the premises were to be exempted solely for the purposes of a tannery business; and that if in bad faith and in fraud of the agreement the premises had been used for any other business, the right to the exemption ceased; and the council were, in my opinion, quite justified in repealing the by-law. Certainly, in such a case the Court should, I think, refuse to interfere on a motion to quash the repealing by-law.

But what are the facts?

It appears that the tannery being lighted by electricity produced on the premises, some of the residents applied to Mr. Alexander to furnish the village with electric light. This he was not willing to do, but, as a result of the application, arranged with a Mr. Shaw to put a larger dynamo in the tannery, which might be used to furnish the light required. The council was notified of the facts and granted permission to erect the necessary poles upon the streets, by resolution dated the 5th of February, 1891, as follows: "That permission be granted to the tannery to erect poles on Centre street to Main street, by the Dominion hotel, for electric light, on condition that they are placed in position not to obstruct thoroughfare."

For the use of the necessary power Mr. Alexander

made no charge and derived no benefit from the transaction, and did what he did gratuitously to accommodate the villagers.

Judgment.

Rose, J.

More than this, a question having arisen between Mr. Alexander and the council about the breach of a condition in the agreement not to erect more than two houses on the exempted premises, in the negotiations which ended in a settlement, Mr. Alexander wrote a letter to the council, dated the 5th of February, in which he stated "that we are now expending a large sum on plant to light your village, and otherwise taking a general interest in the prosperity of the place."

This statement was not as favourable to Mr. Alexander's present position as the facts warrant; the "we," not giving the full information I have above set out; but it shews that the council were quite willing that the tannery company should expend a large sum in plant to light the village; for, after the receipt of such letter, by-law No. 71 was passed by which the council elected not to take advantage of the breach of condition, and confirmed by-law No. 62. This by-law was unfortunately, having regard to a further question raised on the argument, not sealed; but it serves as complete evidence to shew that what was then done, was done in good faith—not for the benefit of Mr. Alexander, but for the benefit of the village; and the council having in February, and again in November, of 1891, determined that such action was not the carrying on of a new business or manufactory, and not a breach of contract, cannot be heard in 1893 to say to the contrary. Indeed, the only pretext that anything improper is being done is, that poles have since been erected without permission and light supplied, for which a charge has been made. Answer to this has been made, and I think successfully, that Mr. Alexander is not to be blamed for this. The streets are under the care of the council, and if poles have been so erected by Mr. Shaw, the council has the remedy in its power, and if they are subject to taxation let them be taxed.

Judgment.

Rose, J.

In face of the facts, this objection does not seem to me creditable to those urging it.

Thus, in my opinion, all the grounds upon which the council acted fail.

The real reason for the course taken, must be what may be deduced from the affidavits of the reeve and councillors, viz., that the majority in favour of the exemption having, since the erection of the tannery and the expenditure of the money, turned into a majority against it, the councillors, yielding to the pressure of their constituents, have become willing to obtain freedom from the obligation entered into, by means fair or unfair. While not impressed with the good faith of the council in passing by-law 89, it is to the credit of the councillors that they did not assume to act upon the following ground taken upon the argument, no doubt upon instructions, but which seems to me to be as little based upon justice as it is supported by law.

The contract and by-law provided that the exemption granted for the period of ten years, should cease at the end of the then current year, if (amongst other things) more than two dwelling houses should be erected upon the exempted premises.

Mr. Alexander, not having a copy of the agreement or by-law, inadvertently, as he stated, erected four houses on the premises for his workmen. On the 4th of February, 1891, the council formally notified him that he had "infringed village by-law No. 62 by building more houses than the by-law allows."

On the 5th Mr. Alexander answered that he had made an unintentional blunder, and asked either that he be permitted to pay taxes on the buildings erected, in excess of the two permitted by the by-law; or, if not, he said, that he would at once have them removed from the premises.

On the 20th November, 1891, by-law No. 71, was passed reciting the facts and enacting that the certain portions of the exempted premises on which the extra dwelling houses had been erected should thereafter be taxed; and

further providing that by-law 62 should be still in force and effect.

Judgment.

Rose, J.

The by-law was duly passed and entered in the by-law book ; but, it is said, that the clerk forgot to put the seal upon it.

The lands mentioned in it were duly assessed and the taxes were paid. The bill of costs incurred by the council in obtaining an opinion from counsel as to their legal position, was sent to Mr. Alexander and paid. Mr. Alexander, had amongst other things, observed the provision of his first agreement and of by-law 62, by not erecting a store upon his premises to furnish supplies to his men and others, which he says he could have done at a profit. Notwithstanding all this, when the council determined to do away with the exemptions and passed by-law 89, they by its terms repealed by-law 71 as well as by-law 62.

It will be observed that by-law 71 was passed before the expiry of the current year in which the buildings were erected.

In *Regina v. Clark*, 1 East pp. 46, 47, Lord Kenyon, C. J., said : " The Court have on several occasions said, and said wisely, that they would not listen even to * * a corporator, who has acquiesced or perhaps concurred in the very act which he afterwards comes to complain of when it suits his purpose : and so far, I think, we have determined rightly."

In *Ex p. Newitt*, *In re Garrud*, 16 Ch. D. 522, it was said, as found in the head note : "*Semble*, that if the ground of forfeiture was the omission of the builder to complete the buildings on the day appointed by the agreement, and the land owner had after that day made advances of money to the builder for the purposes of the agreement, or had in any other way treated the agreement as still subsisting, he would have waived the forfeiture. The decision in *Doe v. Brindley*, 12 Moo. C. P. 37, questioned."

In *Morrison v. Universal Marine Ins. Co.*, L. R. 8 Ex. 197, at p. 204—the judgment of a very strong Court—it

Judgment.

Rose, J.

was said, quoting the language of Bramwell, B., in *Croft v. Lumley*, 6 H. L. C. at p. 705: "The common expression, 'waiving a forfeiture,' though sufficiently correct for most purposes, is not strictly accurate. * * In strictness, therefore, the question in such cases is, has the lessor, having notice of the breach, elected not to avoid the lease? or has he elected to avoid it? or has he made no election? In all this, we agree and think that *mutatis mutandis*, it is applicable to the election, to avoid a contract for fraud." And it is further stated that the election once made, is irrevocable.

In *Crook v. Corporation of Seaford*, L. R. 6 Ch. 551, a municipal corporation was held bound by acquiescence: see also *London Life Ins. Co. v. Wright*, which went through all the Courts, and may be found in 5 S. C. R. 466; Herman's Law of Estoppel, p. 512, sec. 542, *et seq.*; Dillon on Municipal Corporations, 4th ed., indexed under the head of "Estoppel."

Whether it be called acquiescence, waiver, election, or estoppel, it seems to me the facts above stated, prevent the corporation taking advantage of the erection of the houses in 1891, to declare a forfeiture or put an end to the exemption in 1893.

Moreover, may not the unsealed by-law be looked upon as at least a resolution? If so, there is the corporate act. The minutes shew that it was resolved, "That by-law No. 71 be read a third time, passed and engrossed in the by-law book." See Harrison's Municipal Manual, 5th ed., p. 243, note, where the learned author expresses the opinion that a by-law defective for want of a seal may be looked upon sometimes as a resolution or order.

I have not considered whether the Court could require the corporation now to put its seal upon the by-law: *Marshall v. Corporation of Queensborough*, 1 Sim. & Stu. 520, was cited on that point.

I think the motion must be absolute to quash by-law No. 89 with costs.

[COMMON PLEAS DIVISION.]

MANGAN V. THE CORPORATION OF THE TOWN OF
WINDSOR.

Municipal Corporations—Contract for Construction of Sewer—Extension of Time—Power to Employ Labour to Hasten Work—Construction of Contract and Specifications.

A contract for the construction of a sewer made between the corporation of a town and the plaintiff, payment for which was to be made by items according to schedule prices provided for its completion within a limited time, which was extended by resolution of the council and again informally extended for a further period. The contract provided that if the contractor neglected or refused to prosecute the work to the engineer's satisfaction, the corporation might employ and place on the work such force of men and teams and procure such materials as might be deemed necessary to complete the work by the day named for completion and charge the cost thereof to the plaintiff; and by the specifications, which were made part of the contract, the same powers were conferred without any restriction as to time. The work not having been proceeded with to the engineer's satisfaction, the corporation, before the expiration of the second extension of time, exercised the powers above conferred :—

Held, that under the contract the power conferred could only be exercised during the time fixed for the completion of the work or the extension thereof, but under the specifications thereafter; and therefore, even if the corporation could not under the contract avail themselves of the second extension as granted informally, the powers were properly exercised under the specifications.

THIS was a motion by the plaintiff by way of appeal from Statement. the report of the local Master at Windsor, dated the 20th May, 1893; and also a motion for judgment. There was also a cross-appeal by the defendants from the report.

Wallace Nesbitt and Morton (Windsor), for plaintiff.

W. H. P. Clement, for defendants.

The facts appear in the judgment.

February 5, 1894. MACMAHON, J. :—

The contract between the plaintiff and the defendants is under seal. After its execution, a slight variation thereto was made by the engineer of the town acting on behalf of the corporation and the plaintiff.

By the terms of the contract (clause 3), the plans, profiles, and specifications are thereby expressly declared to

Judgment. be incorporated in and form part of the contract, as much
MacMahon, as if the same were severally actually embodied therein.
J.

The contract is not for the performance of the works mentioned therein at a lump sum ; but the plaintiff is to be paid for each particular item forming the subject matter of the contract the fixed prices mentioned therein ; and the contractor is to be paid at the rate of these fixed prices (less twenty per cent. to be retained in the hands of the corporation until the completion of the contract), every fortnight on the certificate of the engineer.

The work under the contract was to be completed by the 1st of November, 1890 ; but the defendants, by resolution, enlarged the time for completion until the 1st of January, 1891.

The plaintiff was at work on the drain on the 19th of February, when the defendants put on a force of men to hasten the completion of the works.

Under the fifth clause of the contract, if the plaintiff neglected or refused to prosecute the work to the satisfaction of the engineer the corporation had two courses open to it : (1) to cancel the contract for completing the sewer and award a contract therefor to another contractor, or (2) to employ and place upon the work such a force of men and teams and to procure and use in and for the prosecution and completion of the work such materials and machinery as to the engineer might be deemed necessary "to secure the completion of the said work by the day hereinbefore agreed upon and fixed for the completion thereof." But a clause in the specifications provides that "The contractor shall commence and carry on the work with due diligence and with as much expedition as the board of works, or its authorized officers, may require ; and in case the contractor shall fail to do so, or shall neglect to provide proper and sufficient materials, or to employ a sufficient number of workmen to execute the work with the diligence or despatch required, then the said board of works shall be at liberty and are hereby authorized to employ other contractors or workmen and to

provide the necessary material and to charge the extra expense incurred thereby to the account of the contractor, and to deduct the same from any sum or sums due or to become due to him under this or any other contract with the said board of works on behalf of the corporation."

Judgment.
MacMahon,
J.

If the corporation employed additional men and procured materials for the purpose of accelerating the work the expense of such employment of men, etc., shall (by the 6th clause of the contract) be chargeable to and be met and borne by the contractor.

By a resolution, passed by the Windsor council on the 16th of February, 1891, the board of works was empowered to employ men and teams and procure such material as necessary to complete the sewer, etc., and to charge the cost thereof to Mangan as provided for in the contract.

It is, I consider, clear from the concluding words of sub-clause 2 of clause 5 of the contract, that the right thereby conferred on the corporation to employ workmen to prosecute and complete the work, etc., must be exercised prior to the time fixed by the contract for the completion of the work; or (as there was no new contract created as in *Wood v. Rural Sanitary Authority of Tendring*, 3 Times L. R. 272), during the extended time allowed for its completion—the extension carrying with it the terms and conditions of the original contract.

As said by Jessel, M. R., in *Burclay v. Messenger*, 43 L. J. N. S. Ch. 449, at p. 456: "A mere extension of time and nothing more, is only a waiver to the extent of substituting the extended time for the original time, and not an utter destruction of the essential elements of the contract."

There was, however, no intention in the present case to create a forfeiture for neglecting to prosecute the work satisfactorily to the engineer, etc. When that is sought to be done where there is a time fixed by the contract for its completion, "it is only with reference to the time so agreed that the rate of progress can be determined, there-

Judgment. fore the clause can only be acted on and enforced on the
MacMahon, ground of delay within the time fixed for the completion
J. of the works, and confers no power of forfeiture after that
date." Hudson on Building Contracts, 420; *Wood v. Rural Sanitary Authority of Tendring*, 3 Times L. R. 272; *Walker v. London and North Western R. W. Co.*, 1 C. P. D. 518.

It is different where a forfeiture is sought for noncompletion to time, as in that case there is "no power to forfeit before the time has arrived, because the event on which forfeiture may take place, has not happened": Hudson on Building Contracts, 421. Or, if the time for completion has been extended, the power to forfeit cannot be exercised till after the extended time: *Barclay v. Messenger*, 43 L. J. N. S. Ch. 449.

The corporation with the design of assisting in the completion of the work on the 19th of February, put on a force of men and provided materials to carry out this object. And the defendants' foreman engaged the labourers then working for the plaintiff as corporation labourers.

The local Master finds that the plaintiff was not prevented from continuing to work on the sewer by himself or with other help, and was informed by the officers of the corporation that he was free to continue on and aid in completing the contract.

The plaintiff in the second paragraph of his statement of claim, alleged that the corporation granted him two extensions of time in which to complete the contract; and that "before the expiration of the said last extension, and on or about the 26th of February, 1891, the defendants improperly and without notice to the plaintiff, took the completion of the construction of the said sewer out of the hands of the said plaintiff and proceeded to complete, and did complete the same."

If, as alleged by the plaintiff, the second extension was granted him and the corporation put on a force of men to accelerate the completion of the works prior to the expiration of such extension, they had, I conceive, power so to do under sub-clause 2 of clause 5 of the contract.

However, the clause in the specifications authorizing the corporation, in the event of the work not being carried on with due diligence, to employ workmen and provide materials, etc., is not restricted to the time within which the work is under the contract to be completed, and is equally efficacious in enabling the corporation to employ workmen to accelerate the completion of the works after the time limited for completing the works under the contract has expired as sub-clause 2 of clause 5 in the contract, is for permitting this to be done before the time for completion has expired.

Judgment.
MacMahon,
J.

The clause under which the defendants in *Walker v. London and North Western R. W. Co.*, 1 C. P. D. 518, proceeded, was one by virtue of which they claimed to avoid the contract, and to forfeit the contractor's implements and materials; and it was held that this could only be done before the time for the completion of the works had expired. But there was in that case a clause in the contract similar to that in the specifications in the present case; and in the judgment the Court said, at p. 532: "The remaining clauses, which are clearly applicable after the time of completion has expired, are stringent enough, assuming the company not to have insisted on the strict performance of the contract."

The corporation of Windsor was not enforcing its strict rights in the performance by the plaintiff of his contract, for a formal extension of time for two months was given by resolution, and after such time had expired, Mangan had, according to the allegation in the statement of claim, received an informal extension of several weeks which had not expired when the corporation put on a force of men. And in his examination in chief on the reference, the plaintiff also said he had gotten an extension of time prior to the defendants putting on the workmen in February, 1891.

Paragraph 18 of the report, states: "At the time the defendants put on a force of men, the work was progressing very slowly, and at that time, and for some time

Judgment. previous thereto, Dougal avenue, being the public street
MacMahon, on which the sewer was being constructed, was impassible
J. by reason of the earth not having been removed and the
street levelled up."

The duty of the corporation to the ratepayers living on Dougal avenue, was to put on men to accelerate the work, and the authority to do so, I consider, existed during the last extension under sub-clause 2 of clause 5, and also by virtue of the clause in the specifications to which I have referred.

There was no question that the object of the corporation in putting on the force was to accelerate the completion of the work. Its *bona fides* was not attacked.

The plaintiff's complaint in his statement of claim, is not that the corporation wrongfully took possession of the work, but that they did not proceed with due diligence, and were guilty of gross delays in completing the work, whereby he suffered damage; and also that the corporation paid exorbitant prices for labour and the material; and that, but for the acts of the defendants, the sewer would have been completed for the amount called for by the contract.

The third paragraph of the plaintiff's notice of appeal puts his contention on the same grounds as in the statement of claim, *i. e.*, that too much labour was employed and too much material used in completing the sewer; and that there was no proper proof of the correctness of the pay rolls of the defendants for wages; and that there was no proper accounting by the defendants for moneys alleged to have been expended by them on the said work after said time.

Either under sub-clause 2 of clause 5, read in connection with clause 7 of the contract, or under the clause of the specifications, already referred to, the whole cost and expense connected with the employment of workmen and of procuring materials, etc., is to be charged against the contractor, and the amount is to be deducted from any sum due or to become due to him under the contract. The corporation thereby merely became the paymaster for the workmen and materials.

The frame of the action being that the corporation had paid exorbitant prices for the labour and materials, much evidence was given on the part of the plaintiff in support of, and by the defendants against the case so attempted to be made.

Judgment.

MacMahon,
J.

[The local master found in favour of the defendants on this ground. The learned Judge discussed his finding, and came to the conclusion that the finding was correct, and continued]:

The corporation having the power to put on workmen and supply materials to complete the contract, the expenditure so made would, on the authority of *Tooth v. Hallett*, L. R. 4 Ch. 242, be properly allowable against Masen, St. Louis and Tuite, who are the equitable assignees of Mangan, of the balance of twenty per cent. which the corporation had in the treasury to Mangan's credit. But even could it be shewn that any portion of the twenty per cent. retained by the defendants, had not been used by the corporation for the purpose of completing the works, the plaintiff could not recover for his own benefit: *Jeffs v. Day*, L. R. 1 Q. B. 372.

If the assignees of Mangan, or any of them now desire to become parties plaintiff to the action, they may do so on filing a written consent.

One great difficulty the plaintiff has to meet, is the absence of a final certificate. Authorities need not be multiplied, *Scott v. Corporation of Liverpool*, 3 DeG. & J. 334, being conclusive on the point.

There was a final estimate or certificate given by the engineer to the town on 17th of June, 1891, and referred to in the thirty-ninth finding of the local Master. What the nature or purpose of the certificate is, I am not aware, as it is not amongst the exhibits. The board of works reported in favour of accepting the sewer. And the council on the 12th June, 1891, adopted the report.

The action must be dismissed with costs.

G. F. H.

[QUEEN'S BENCH DIVISION.]

IN RE TRUSTEES OF SCHOOL SECTION NO. 5 OF THE TOWNSHIP OF ASPHODEL AND THOMAS HUMPHRIES.

Public Schools—By-law Altering School Sections—Time for Passing.

Sub-section 3 of section 81 of The Public Schools Act 54 Vic. ch. 55 (O.) provides that by-laws passed under the said section for altering, etc., school sections, shall not be passed later than 1st May in the year, and shall not take effect before the 25th December next thereafter :—

Held, that the word “year” as used therein, means the calendar year commencing 1st January, and ending 31st December, and that a by-law altering certain school sections passed on the 25th September, was invalid.

Statement.

THIS was a motion to quash a by-law passed under sub-sec. 2, of sec. 81, of the Public Schools Act, 54 Vic. ch. 55 (O.), by the corporation of the township of Asphodel, for altering certain school sections therein by transferring certain lots in the township from one school section to another.

The by-law was passed on the 25th September, 1893, and it was objected that it was not passed during the time prescribed by sub-sec. 3, for the passing thereof.

February 8th, 1894. *E. B. Edwards* supported the motion.

Aylesworth, Q. C., contra.

February 13th, 1894. ARMOUR, C. J. :—

It is impossible, in my judgment, to uphold the by-law attacked against the objection taken to it, that it was not passed during the time prescribed by law for the passing thereof.

The Act 54 Vic. ch. 55, the Public Schools Act, 1891, sec. 81 sub-sec. 3 provides that “every such by-law shall not be passed later than the first day of May in any year, and shall not take effect before the 25th day of December next, thereafter.”

The word "year" as used in this provision clearly means Judgment.
 the calendar year, the year commencing on the first day of Armour, C:J.
 January and ending on the 31st day of December: *Gibson*
v. Barton, L. R. 10 Q. B. 329.

This by-law was passed on the 25th day of September, 1893, and is within the prohibition of the above provision.

It must, therefore, be quashed with costs.

G. F. H.

[COMMON PLEAS DIVISION.]

GRINSTED V. THE TORONTO RAILWAY COMPANY.

Street Railways—Persons Entitled to be Transferred—Illegal Removal from Car—Illness Consequent by Exposure to Cold—Damages Therefor—Remoteness.

A passenger on a street railway having the right to be transferred from a car on one street line to that of another street line on the railway was refused such right by the conductor of the car to which he had the right to be transferred, and was forced to leave it:—

Held, that he was entitled to recover damages occasioned by an illness caused by exposure to the cold in leaving the car, such damages not being too remote.

The defendants, an incorporated company, were the successors of certain persons who had purchased the road, and although no conveyance of the road to the defendants was proved, it was shewn that the persons working the railway at the time of the occurrence were in defendants' employment, and that the car in question was in charge of their employees:—

Held, sufficient evidence that the defendants were operating the road so as to render them liable to the plaintiff.

THIS was an action of trespass for forcibly ejecting the plaintiff from a car of the defendants, and was tried before Statement.
 STREET, J., and a jury, at Toronto, at the Autumn Assizes, 1893.

The facts fully appear in the judgments.

The jury found for the plaintiff with \$200 damages for assault and putting him off the car; and \$300 for illness occasioned by exposure to cold by being so put off.

The defendants moved on notice to set aside the judgment entered for the plaintiff, and to have the judgment entered in their favour.

Argument.

In Michaelmas Sittings, December 6th, 1893, before a Divisional Court composed of GALT, C. J., ROSE and MACMAHON, JJ., *Laidlaw*, Q. C., supported the motion. There is no evidence before the Court that the defendants were the owners of the road at the time of the alleged expulsion of the plaintiff from the car. The company were incorporated by 55 Vic. ch. 99 (O.). By section 3 power is given to the persons named as purchasers in the Act to transfer the property and rights in the railway to a company. No contract is proved to have been entered into between the purchasers and the defendants, nor any transfer of the property to them. No right to transfer was proved. Clause 33 of the conditions of sale, which are made part of the Act, requires the approval of the city engineer and the endorsement of the city council, and no such approval or endorsement has been shewn. The plaintiff also should have shewn that he was entitled to be transferred by causing himself to be identified by the transfer man to the conductor. There must be some mode of identification. It was the plaintiff's duty to leave the car when ordered by the conductor to do so. His resistance was improper, and was for the purpose of making a case against the company : *Butler v. Manchester, etc., R. W. Co.*, 21 Q. B. D. 207, 212 ; *Hall v. Memphis, etc., R. W. Co.*, 15 Fed. R. 57. The defendants feel that this is not a meritorious action, and they think they are properly entitled to raise every objection. The claim for what is called an exposure to cold is too remote, and the evidence thereon should never have been submitted to the jury. This has been expressly decided in *Hobbs v. London and South-Western R. W. Co.*, L. R. 10 Q. B. 111. In that case it was held that illness resulting from exposure to cold and its consequences, were too remote from the breach of contract to entitle the plaintiff to damages therefor : *Glover v. London and South Western R. W. Co.*, L. R. 3 Q. B. 325 ; *Indianapolis, etc., R. W. Co. v. Birney*, 71 Ill. 391 ; *Sedgwick on Damages*, 8th ed., sec. 113. The breach of the contract only entitled the plaintiff to one amount of dam-

ages, and therefore the damages should not have been divided. The submission of the evidence as to exposure to cold, prejudiced the minds of the jury in deciding on the other head of damages. In any event the damages should be reduced to nominal damages: *Huntsman v. Great Western R. W. Co.*, 20 U. C. R. 24; *Davis v. Great Western R. W. Co.*, 20 U. C. R. 27. Argument.

McWhinney, contra. It is not necessary to shew how the defendants came into possession of the road. It is sufficient to shew, as the plaintiff has done, that the defendants were operating the road; and, in so doing, they assumed all the liabilities imposed by the Act, including the obligation to transfer: *Fitzgerald v. Grand Trunk R. W. Co.*, 19 S. C. R. 359. The plaintiff was not bound to shew that the transfer rules had been sanctioned by the engineer and city council. All that he had to shew was that he had complied with the transfer rules in force; and this he did. The damages for exposure to cold were in no way remote. They were the immediate result of the defendants' illegal act. The damages are not merely for the breach of the contract; but for the tort in putting the defendant off the car. The case of *Hobbs v. London and South Western R. W. Co.*, L. R. 10 Q. B. 111, relied on by the defendants, has been overruled by subsequent decisions; *McMahon v. Field*, 7 Q. B. D. 591, 596; *Lilley v. Doubleday*, 7 Q. B. D. 510; Sedgwick on Damages, vol. 2, 8th ed., p. 650; Beven on Negligence, pp. 92-3; *McKelvin v. City of London*, 22 O. R. 70; See also *Brown v. Chicago, Milwaukee and St. Paul R. W. Co.*, 54 Wis. 342; 41 Am. R. 41; *International and Great Northern R. W. Co. v. Terry*, 50 Am. R. 529; *Milwaukee and St. Paul R. W. Co. v. Kellogg*, 94 U. S. R. 469; *Smith v. London and North-Western R. W. Co.*, L. R. 6 C. P. 14; *Cincinnati, etc., R. W. Co. v. Eaton*, 48 Am. R. 179; *Hatchell v. Kimbrough*, 4 Jones, North Carolina, 163; *Clark v. Chambers*, 3 Q. B. D. 327; *Burrows v. March Gas and Coke Co.*, 39 L. J. N. S. Ex. 33. Even if the plaintiff is not entitled to damages for the exposure to

Argument. cold, the submission of the evidence relating thereto cannot affect his right to the other damages allowed. The learned Judge expressly pointed out the different heads, and told the jury to keep the distinction in view. The case of *Hall v. Memphis and Charleston R. W. Co.*, 15 Fed. Rep. 57, is opposed to the more recent American decisions. It is now held that a passenger rightfully travelling on his ticket, is not bound in order to entitle him to maintain an action for the refusal to carry, to pay fare wrongfully demanded, or to leave the car on the conductor's order, and is entitled to damages for expulsion: *Lake Erie and Western R. W. Co. v. Fixe*, 11 Am. & Eng. Ry. Cas. 109; *Hamilton v. Third Avenue R. W. Co.*, 53 N. Y. 25; *Dancey v. Grand Trunk R. W. Co.*, 20 O. R. 603, 19 A. R. 664.

February 5th, 1894. GALT, C.J.:—

In my opinion there is no dispute as to the facts.

The plaintiff was a passenger on a Queen street car going east, in the city of Toronto, on the night of 10th January, last; he had paid his fare, and, according to the Act 55 Vic. ch. 99, clause 33, p. 911, was entitled to a transfer. This provision is not subject to any condition. He got out of the car at Spadina avenue; and, according to his own evidence, waited for about ten minutes for a belt line car; he got into one, and was asked for his fare by the conductor; he claimed to be a "transfer;" the conductor would not assent to his right, and told him he must either pay his fare or he would put him off; he refused to pay the fare and got off the car; he then returned to the corner of Spadina avenue and Queen street, and, according to his own evidence, was placed on another car and taken to a place at the foot of Simcoe street, where he left the car and called at the Avondale hotel, expecting to receive some letters; he then walked to his lodgings, which, according to his own statement, took about twenty minutes. There is no doubt, from the evidence, it was a very cold night. Next morning he was taken ill, and in consequence this action was brought.

This is not an action for breach of contract, like *Hobbs v. London and South-Western R. W. Co.*, L. R. 10 Q. B. 111; if it was, the plaintiff would have no cause of action, for, according to his own evidence, the defendants fulfilled their contract, as they did carry him as a "transfer" without charge till he got off at the end of his journey. The action is in trespass for improperly ejecting him from the first car.

Judgment.

Galt, C.J.

In my opinion, the conduct of the plaintiff in refusing to pay his fare, considering he had, according to his own evidence, several tickets in his possession, was in exercise of an extreme right and very foolish, the night being very cold; however, he thought fit to do so, and, as he was wrongfully ejected, I do not see how we can interfere with the finding of the jury as to this—I mean as to putting him off the car.

At the close of the case the learned Judge directed the jury if they found the plaintiff entitled to a verdict to damages to divide them into two heads: First, his being turned out of the car; secondly, his illness, and his having to incur expenses in consequence thereof.

The jury found a verdict as follows: Damages, \$500; \$200 for the assault and putting him off the car, and \$300 for the subsequent consequences.

As to the last finding, according to his own evidence the night was very cold; he waited for ten minutes till a car came in the first instance; he then subsequently, after he was taken to the Avondale hotel, left the car, and was about twenty minutes walking home. He then states: "Well, I went home, and when I got there, as I tell you, I was cold and chilled to the very bone;" and it is very probable the complaint from which he afterwards suffered arose from the twenty minutes of exposure to which he voluntarily subjected himself after leaving the car. This, however, was a question for the jury, and, as they have found, I do not see how we can interfere.

Judgment. ROSE, J. :—

Rose, J.

The plaintiff was put off of a car on the street railway, on the 10th January, 1893, by a conductor in charge of such car, on the ground that he had not paid his fare on the car from which he had just been transferred.

The plaintiff's right to a transfer, if he had paid his fare, was not denied. The question at issue between him and the conductor was, whether he had previously paid his fare.

The jury found for the plaintiff, assessing the damages as will hereafter appear.

At the close of the plaintiff's case, counsel for the defendant company contended that there was no evidence to shew that this company operated the railway, or was liable to the plaintiff for removing him from the car, and referred to the Act of incorporation, 55 Vic. ch. 99 (O.). The plaintiff certainly did not formally prove that any contract had been entered into between the corporation and the persons named in the Act as purchasers, nor did he prove any formal transfer of the purchasers' interest in the road to the corporation. But it seems to me that there was sufficient evidence to go to a jury that the defendant company was operating the road, and that the conductor was its officer.

Mr. Gunn was called and stated that he was an officer of the defendant company and superintendent of the road. That fact alone affords sufficient evidence that the company was operating the road. In addition, a witness was called on behalf of the company, one McCallum, and the first question put to him by counsel for the company was, "You are in the employment of the Street Railway?" to which he said, "Yes." He was the transfer agent at the corner of Spadina and Queen on the night in question. In his evidence he spoke of Hadral, the conductor of the car on the night in question, saying that he had left the Toronto Railway's employ to accept a situation in England. This furnishes evidence, therefore,

that the company had in its employ both himself, as transfer agent, and the conductor who put the plaintiff off the car. The plaintiff also proved that there was a notice in the car to passengers, to the effect that passengers desiring transfers from one line to another, upon giving notice to the conductor should be entitled to a transfer.

Judgment.

Rose, J.

As I have said, the conductor did not challenge the right of the plaintiff as a passenger to a transfer, if he had paid his fare, and subsequently the plaintiff, having been put off this car, was by the transfer agent above referred to, put upon a car and transferred free of further charge.

There was ample evidence, therefore, it seems to me, that the company was operating the railway; that the car in question was a car in the charge of the servants of the company, and that if the plaintiff had paid the fare in the car in which he first travelled, he was entitled, according to the rules of the company upon which its servants were acting, to be transferred so as to reach his place of destination on the payment of one fare.

The fact that the notice was issued by Mr. Gunn when secretary-treasurer of the former company cannot be of importance. He, as superintendent of the defendant company, chose to adopt such notice instead of preparing a fresh one. The company did not offer any evidence as to the fact, and in the absence of any evidence to the contrary, it may be assumed it had the rights it assumed to exercise.

There was substantially no other question for consideration upon the motion by the company against the verdict except the question of damages. Upon the findings of the jury it must be assumed that the plaintiff had paid his fare; that he was rightfully in the car from which he was ejected: that he was entitled to his transfer; that the transfer agent had given the usual notice to the conductor that the plaintiff was entitled to a transfer; that if the conductor did not receive such notice it was his own negligence and fault; that the plaintiff had done everything to entitle him to be carried to his destination,

Judgment.

Rose, J.

and that the conductor in putting him off the car was guilty of an act of unjustifiable trespass. This trespass was rendered the more annoying by the use of strong language and charge of dishonesty made against the plaintiff.

The jury upon the direction of the learned trial Judge divided the damages under two heads, and found that he was entitled to \$200 for the assault and putting him off the car, and to \$300 for "subsequent consequences," which may be explained by the charge of the learned Judge which was as follows:—"Now, if you find that the plaintiff is entitled to damages; if you find that his illness was the natural result, the natural or probable result from his having been turned out of the car on that night, then find damages upon that ground as well."

The plaintiff had a very severe illness which he claimed was the result of being put out of the car on that night. The jury found that his illness was the result and the natural or probable result from his having been turned out of the car. There was evidence to go to them—the plaintiff said that he "got cold upon being put out of the car." His exact answer was "Yes, I got cold *then*. I had to go back to the transfer agent," "then" referring, as I read it, to the time when he was being put out of the car. This is not merely opinion evidence. Whether he did or did not catch cold, and the time when he caught cold was a question of fact as to which he himself might have had knowledge. He might or might not know the exact moment when he did catch cold; although it is quite possible he did. He may have experienced the sensation of a chill, and his statement as to when he caught cold being left unchallenged and practically unexamined upon, might well be received by the jury as sufficient evidence of the fact. The charge of the learned Judge was not objected to. The jury having found the fact, I do not see how we can interfere. As to interfering with the findings of a jury—if it is necessary at all to refer to authority upon the point—one might note the interesting discussion in the Court of Appeal in

Williams v. Eady, 10 Times L. R., 41, and the discussion which took place between the Judges and the counsel in that case. Judgment.
Rose, J.

It was argued before us on the authority of *Hobbs v. London and South-Western R. W. Co.*, L. R. 10 Q. B. 111, that such damages could not be allowed. The decision in that case has been practically overruled by the Court of Appeal in England in the case of *McMahon v. Field*, 7 Q. B. D. 591, 596, and has been doubted in *Lilley v. Doubleday*, 7 Q. B. D. 510. See also *McKelvin v. City of London*, 22 O. R. 70; Sedgwick on Damages, 8th ed., vol. 2, p. 650; *Town of Prescott v. Connell*, 22 S. C. R. 147, and *York v. The Canada Atlantic Steamship Co.*, 22 S. C. R. 167. This latter case recognizes and acts upon the principle of decision contended for by the plaintiff here as to damages.

In the light of these authorities I venture to think the law is, that where an act of trespass has been committed and an injury results from such act of trespass, the party suffering such injury is entitled to compensatory damages, no matter what may be the nature of the injury, if it be the natural or probable result of the wrongful act. It must be a question of fact in each case. I need not illustrate.

The jury having, in response to the learned Judge's charge, found that this illness was the natural or probable result from the plaintiff having been turned out of the car on the night in question, I think that the verdict cannot be disturbed.

The motion will be dismissed with costs.

MACMAHON, J. :—

The plaintiff when he got off the Queen street car at the corner of Spadina avenue, waited there ten minutes to get a car going south on Spadina avenue, and Mr. Kirkpatrick, a passenger on the Spadina avenue car, states that when the plaintiff entered the car "he was blowing as if very cold." I suppose "blowing" meant blowing on his fingers.

Judgment.

MacMahon,
J.

The cold suffered that night by the plaintiff which it is alleged brought on his illness, may have been occasioned by his remaining on the corner of Queen street and Spadina avenue during that ten minutes; or it may have been occasioned by his walk from King street to the Avondale hotel, and from thence to his quarters; or it may have been occasioned by his standing on the corner after being told by the conductor to leave the car. But as to the particular occasion on which he took the cold conducing to his illness, one would say it must be somewhat a matter of conjecture.

In actions of the character of the present, it is said: "There must not only be a legal connection between the injury and the act complained of, but such nearness in the order of events and closeness in the relation of cause and effect that the influence of the injurious act may predominate *over other causes* and concur to produce the consequence or be traced to those causes: Sutherland on Damages, 2nd ed., sec. 34.

If the cold from which the plaintiff suffered might have resulted from any of several causes, it is difficult to see how the plaintiff has satisfied the onus cast upon him of shewing that the cause of his illness was occasioned by the act of the defendants, unless he has done so by the excerpt taken by my brother Rose from the plaintiff's evidence and upon which the jury no doubt acted. Had I been a jurymen it would not to my mind have been satisfactory evidence as to the time when the cold of which plaintiff complained was contracted; but having been passed upon by the jury, I cannot now say it was not sufficient.

As to the point upon which the motion for a nonsuit was urged at the trial and at the bar—that there was no evidence that the defendant corporation was operating the railway. The franchise of the Toronto Street Railway Company was purchased from the city by and transferred to Messrs. Kiely, Everett & Woodworth, who in the agreement with the city are called "The Purchasers," and they applied for and obtained from the legislature of Ontario

an Act to incorporate "The Toronto Railway Company" (55 Vic. ch. 99). By sub-sec. 1 of sec. 6 of the Act if "The Purchasers" who are mentioned in the Act as the corpora-
 tors, form a Joint Stock Company, the company so formed should, with the assent of the city, be substituted for "The Purchasers," and "The Purchasers" should then be discharged from their covenants to the city. If such Joint Stock Company was formed it exercised its rights and powers under the Act incorporating "The Toronto Railway Company." There is the evidence of those who were called upon the part of the defendants and say they are the servants of the "Toronto Railway Company," which corporation is operating the road. Did the necessity exist of any formal proof of a transfer by "The Purchasers" to the "Toronto Railway Company," and the assent of the city thereto, I should have been for allowing the plaintiff to give evidence establishing the fact.

Judgment.
 MacMahon,
 J.

By the 33rd clause of the conditions of sale from the city to "The Purchasers" embodied in the Act, the payment of a fare entitles the purchaser to a continuous ride from any point on the railway to any other point, and transfer arrangements to enable this to be done must be made to meet the approval of the City Engineer and the endorsement of the council. That is, the transfer must be made by the railway company so as to enable the passenger to reach the ultimate point he destines to go by a continuous ride on the railway. The railway company cannot arbitrarily conclude the method of transfer which it will adopt, hence the required approval of the City Engineer to the method proposed to be adopted. But because the method of transfer submitted may not have been approved, that does not deprive the passenger of his right to a transfer under the contract between the city and "The Purchasers" to the company to whom "The Purchasers" had assigned their rights—any more than the passenger could have been deprived of his right to a transfer had no method of transfer been submitted to the city.

After much hesitation as to the first ground, I agree that the judgment cannot be disturbed.

G. F. H.

[COMMON PLEAS DIVISION.]

EWING V. TORONTO RAILWAY CO.

Street Railway—Rate of Speed—Right of Way—Collision—Negligence.

The right of way which street railway cars have over the portion of the street on which the rails are laid, is not an exclusive right or a right requiring vehicles or pedestrians at all hazards to get out of the way at their peril; and notwithstanding the absence of any regulations as to speed, the cars must be run at such a rate as may be reasonable under the circumstances of each particular case.

The plaintiff was sitting on a waggon which was being driven on that part of the street occupied by the rails, and while going down a steep incline, a motor car and trailer coming along behind, by reason of the motor-man not having proper control of the car, and of the excessive speed thereof, the waggon was run into and the plaintiff injured:—
Held, that the defendants were liable therefor.

Statement. THIS was an action for damages for the negligent management by the defendants of an electric motor on their line of street railway, and was tried before STREET, J., and a jury, at Toronto, at the Autumn Assizes of 1893. The plaintiff was the occupant of a waggon in company with the owner, one David McMillan, who was driving when it was run into by the motor, and overturned, and the plaintiff was injured.

The facts are set out in the judgment of MACMAHON, J.

Questions were submitted by the learned trial Judge to the jury, which, with their answers thereto, were as follows:—

1. Were the defendants guilty of any negligence in the running of the motor in question by which negligence the accident was brought about? A. Yes.

2. If so, in what did such negligence consist? A. In not having control of their motor, by running too fast.

3. Might McMillan have avoided the accident by using reasonable care and diligence? A. No.

Upon these findings judgment was entered for the plaintiff.

The defendants moved on notice to set aside the judgment entered for the plaintiff, and to have judgment entered in their favour.

In Michaelmas Sittings, December 8th, 1893, before a Divisional Court composed of GALT, C. J., ROSE, and MAC-MAHON, JJ., *Osler*, Q. C., and *Laidlaw*, Q. C., supported the motion. There was no negligence on the part of the defendants. Under condition 39 of the conditions forming part of the agreement embodied in the Act of incorporation, 55 Vic. ch. 99 (O.), the defendants' cars have the right of way over the portion of the street on which the rails are, for which privilege the defendants under condition 9, pay the amount of \$800 per mile; and there is no limitation to the rate of speed. The object of the introduction of electric railways is to attain quick transit, and the convenience of the individual must give way to that of the public. The cars run on fixed rails and are limited to the space in which the rails are, while vehicles and pedestrians have the whole road. The cars thus being limited as to space and having the right of way, vehicles and pedestrians must give unobstructed passage to them, and must get out of their way. The motor-man as the car proceeds along sees from time to time numbers of vehicles and pedestrians on the street at various distances ahead of him. He properly assumes that they will get out of the way of the car; and if they fail to do so they take upon themselves the risk of an accident, which is the consequence of their own act. In any event he cannot be called upon to make the attempt to stop or slow up the car until he finds that they are not getting out of the way. Quick transit would be impossible if the motor-man were obliged to stop or slow up every time he saw a vehicle ahead of him; and it would be unreasonable that a car full of passengers should be delayed by the unnecessary obstruction of the track by vehicles or pedestrians: *Hannibal and St. Joseph R. W. Co. v. Young*, 19 Am. & Eng. Ry. Cas. 512; *Powell v. Missouri Pacific R. W. Co.*, 8 Am. & Eng. Ry. Cas. 467; Booth on Street Railways, secs. 303, 318-9, 321. The whole cause of the accident was the carelessness and foolhardiness of the driver of the waggon in attempting to race with the car: *Spaulding v. Jarvis*, 32 Hun 621; *Patton v. Philadelphia Traction Co.*, 132 Penn. 76.

Argument.

Argument.

Frank Denton, contra. There was clearly negligence on the part of the defendants. The motor-man is not justified in assuming that because the car is confined to the portion of the street where the rails are, and that vehicles and pedestrians can go in any direction, that the vehicle or person will under all circumstances get out of the way; and therefore, though danger be imminent, he is not called upon to exercise any precaution to avoid accidents. The right of way which the cars have is merely a limited right, and does not absolve him from exercising due care. The safety of the public must be kept in view, and every precaution used to avoid accidents. The car here was being driven at an unusual rate of speed. The rate of speed here was in itself evidence of negligence. The motor-man knew he was on a steep incline, and that every precaution was necessary to keep the car in check, but instead of doing so he proceeds down the incline at a rate of speed, as some of the witnesses say, of at least twenty-five miles an hour; and when he attempts to stop the car, he finds that it is too late. The jury have found that the motor-man had not proper control of the car, and that the rate of speed was excessive, and which were the causes of the accident. The charge that the accident was caused by racing with the car is disposed of by the evidence and the finding of the jury. The plaintiff, however, being the invited guest of the driver of the vehicle, would not be responsible for his negligence: *Mills v. Armstrong, The Bernina*, 13 App. Cas. 1; *Little v. Hackett*, 116 U. S. R. 366. He referred also to Booth on Street Railways, p. 305; *Lyman v. Union R. W. Co.*, 114 Mass. 83; *Albert v. Bleeker Street, etc., R. W. Co.*, 2 Daly N. Y. 389; *Tuff v. Warman*, 5 C. B. N. S. 573; *Mussoth v. Delaware and Hudson Canal Co.*, 64 N. Y. 524; *Wilds v. Hudson River R. W. Co.*, 29 N. Y. 315.

Osler, Q. C., in reply. The rate of speed is not, *per se*, evidence of negligence: *New York, Philadelphia and Norfolk R. W. Co. v. Kellams*, 32 Am. & Eng. Ry. Cas. 114; *Hannibal and St. Joseph R. W. Co. v. Young*, 19 Am. & Eng. Ry. Cas. 512.

February 5th, 1894. MACMAHON, J. :—

Judgment.

MacMahon,
J.

David McMillan was driving a pair of horses with a waggon into Toronto, and the plaintiff, who lived in Toronto, was, by McMillan's invitation, occupying a seat in the waggon. There were four people in the waggon, McMillan occupying the front seat and driving the horses. As the tram proceeded southward into the city, the waggon was running on the west track of the company's rails. About fifty feet south of Roxborough street west, there commences a down grade to the south of twenty feet three inches in a distance of 560 feet—that is, from the top of the grade to the foot of what is known as "Tannery Hollow." It is admitted on all sides that after McMillan's team reached this down grade, the horses proceeded at a very rapid pace to the bridge crossing the Tannery Hollow, one of the horses running and the other galloping. The tram of the railway company which caused the collision, started from North Toronto Junction, and consisted of a motor car and a trailer, and was on its return trip south, and reached the top of the grade very shortly after McMillan had passed that point. There is a direct conflict in the testimony as to the rate of speed at which the car went down the grade, and as to the conduct of the motor-man and conductor in the care and diligence displayed by them in endeavouring to control the speed of the car. Some of the passengers on the car thought the rate of speed attained was from twenty to twenty-five miles an hour, and a Mr. McLean, who lives near the hollow, watched the motor and the motor-man, and he considered the car was coming down the grade at twenty-five miles an hour; and that the motor-man was standing with his hand on the handle of the brake, but not making any effort to slacken speed. Policeman Umbagh was standing at the top of the grade, and thought the car going very fast, but did not give what he considered the rate of speed.

Other passengers on the car thought the cars were running from ten to twelve miles an hour; and there is evi-

Judgment. dence that just prior to the collision, the conductor was
MacMahon, applying the brakes apparently with all his strength.
J.

The plaintiff Ewing was sitting on the back seat in the waggon, and said he became aware of the approach of the trolley by hearing the gong on the motor sounding when he turned round, and the car was then seventy-five yards behind the waggon. He immediately notified McMillan, who looked back, and he (McMillan) considered the distance between himself and the motor car seventy-five yards. According to his evidence he commenced turning his horses to the east to get off the track, and had succeeded in getting clear of the track with the exception of one of the hind wheels, which the trolley struck, and overturned the waggon, and so injured the plaintiff.

Mr. Booth's work on Street Railway Law, is a recognized authority on the subject, and in section 303, after alluding to the wide divergence of opinion expressed in the earlier cases as to the relative rights of cars and private vehicles in the use of that portion of the street occupied by the tracks, points out that the opinions expressed in these earlier cases, "both ignored an essential element of the new and always difficult problem of correctly defining and wisely regulating such a joint use of the public highway, *i. e.*, the relative rights of persons lawfully travelling at the same time upon the same street, in vehicles differing in size and construction, in many instances necessarily driven at different rates of speed, one class being confined to fixed tracks, the other so constructed and propelled as to be more easily stopped, to turn readily to avoid obstacles and to prevent collisions, and to travel without inconvenience upon any part of the roadway. A reconsideration of the earlier decisions, aided by time and experience, has resulted in establishing the rule, now well nigh universal, that a street car has, and from the necessities of the case must have a right of way on that portion of the street upon which alone it can travel, paramount to that of ordinary vehicles, but that this superior right does not prevent others from driving across or along its tracks at any place

or at any time when by so doing, they will not interfere with the progress of the cars. In this case the better right is not an exclusive right; but, being to the extent stated paramount, it will be enforced against all who needlessly impose obstacles to its free and unrestricted exercise. Other travellers, therefore, must yield the right of way."

Judgment.
MacMahon,
J.

See also the judgment of Hagarty, C. J., in *Follet v. Toronto Street R. W. Co.*, 15 A. R. at p. 352.

The duty of the driver of a private vehicle while on the track is thus defined in section 316: "Not only to turn off when called upon by a servant of the railway company, but to listen to whatever signal there may be of an approaching car; and he should also look behind him from time to time so that he may, if a car be near, turn off and allow it to pass without hindrance or any slackening of ordinary speed; and if he fails to observe this precaution he does so at his own risk." And at section 317 the author says: "And as the company is entitled to the unrestricted use of its rails for the passage of its cars within the limit of speed which the law allows, the driver of any other vehicle, being unnecessarily upon the track is bound to exercise greater care than when upon the common pavement, to see that the approaching car is not impeded."

The duty of a person occupying the tracks with a vehicle being thus fully and clearly stated, the reciprocal duty or obligation of the company towards those using its tracks is thus defined in section 303: "The public yields none of its rights to make ordinary use of the streets, and the companies accept their grants with the implied condition that this right of the public cannot be unnecessarily impaired or lessened." And in section 305: Therefore, "the driver is bound to notice the presence of other vehicles and pedestrians ahead of his car, and should be watchful to see that the way is clear. Where he has reason to apprehend danger, he should regulate the speed of his car so that it may be quickly stopped should occasion require it. * * He is not justified in assuming that because the car is confined to its tracks and a private vehicle can turn in any direc-

Judgment. tion, the driver of the latter will under any and all circumstances get out of his way, and, therefore, although the danger is imminent, take no precautions to avoid a collision." And in section 306: "One of the principal obligations imposed upon him (the motor-man or driver) by law, for the protection of the travelling public, is, that he should exercise due diligence to avoid injury to others who are on the highway."

MacMahon,
J.

The question of due care and diligence of the motor-man or driver of a trolley car in regulating the rate of speed and taking the other precautions to avoid a collision is one to be dealt with by the jury, having regard to the locality, the incline grade upon which he was running, the distance he had to run on such incline, the rate of speed at which he was going, and the time, with that rate of speed, before he would overtake McMillan's waggon, then on the track in front of him.

The jury found the defendants' negligence consisted in not having control of the motor, and in running too fast. They were not asked the rate of speed at which the trolley was running, and perhaps, if asked, they might have been unable to answer.

McMillan says it was only four seconds from the time he looked around and saw the car coming until the trolley struck the waggon, and as he had whipped up his horses to get off the track, he thought the horses had gone a distance of seventy-five yards. A few seconds would be consumed in endeavouring to start his horses off the track, so that he was beyond question, in a position of great peril, unless the motor-man succeeded in stopping the car, or he (McMillan) managed to get his waggon off the track in that limited time. The jury have exonerated McMillan from having in anywise contributed to the accident; and if, as sworn to by McMillan, by the plaintiff and by the other occupants of the waggon, that immediately upon his becoming aware that the trolley was approaching he endeavoured to leave the track, the finding of the jury is a proper one.

There was evidence that those in the waggon had looked back on several occasions and laughed or smiled, acting as if they were running a race against the trolley. In his charge, my brother Street properly drew attention to this evidence, and told the jury that if McMillan and those with him, were parties to a race with the trolley, and it was with that object they remained on the track, the plaintiff would not be entitled to recover.

Judgment.
MacMahon,
J.

The jury, however, did not regard this as being the true state of the case.

Mr. Denton urged that the rate of speed at which the trolley was running, was *per se* evidence of negligence. The cases of *New York, Philadelphia and Norfolk R. W. Co. v. Kellams*, 32 Am. & Eng. Ry. Cas. 114; *Hannibal and St. Joseph R. W. Co. v. Young*, 19 Am. & Eng. Ry. Cas. 512, shew that the question, whether cars are running at a rate dangerous to the public, is a question exclusively for the jury. In this Division it was held in *Osgoodby v. Toronto Street R. W. Co.* (not reported), that the rate of speed is not *per se* evidence of negligence.

There was a direct conflict in the evidence upon all the material points, and where that is the case, it is the exclusive prerogative of the jury to deal with it. There are no grounds upon which we can interfere with the exercise of that prerogative. The motion will, therefore, be dismissed with costs.

ROSE, J.:—

I cannot accede to Mr. Osler's argument that, in the absence of any ordinance regulating the rate of speed, a street car may be run at any rate of speed, according to the pleasure of the motor-man or conductor, and that the public using the streets, either as pedestrians or riding or driving in vehicles, must keep out of the way, or, in other words, use the streets at their own peril. And even if, by agreement with the city, the rate of speed be limited to a named number of miles per hour, running the cars within

Judgment. such limit might, under some circumstances, be an act of
Rose, J. gross negligence. The rate of speed must be reasonable, and what would or would not be reasonable or unreasonable must depend upon the circumstances of each case—such as the number of persons upon the streets, either on foot or riding or driving, or the hour of the day, and the locality upon which would depend the probability of persons coming suddenly upon the street from the sidewalks, or side or cross streets.

No person is bound to anticipate that those in charge of a car will run the car at a rate of speed dangerously or recklessly high, and, therefore, to take precautions against such negligence or recklessness.

Could it be said that a person crossing King street at its intersection with Yonge, should anticipate and guard against a car coming from any direction at, say, twenty-five miles an hour, if such a rate of speed be possible? And if, in this case, the car in question was being run at such a rate of speed, and the plaintiff, or the owner, did not anticipate or guard against a collision with it, but acted just as he should reasonably have acted had the car been run at what might be considered a reasonable rate of speed, and, as soon as he discovered the very high rate of speed, did what he reasonably could to avoid a collision, can it be said he has no cause of complaint, assuming that twenty-five miles an hour was, at such time and place and under such circumstances, an unreasonably high rate of speed.

I do not see how, on the facts, the case could have been withdrawn from the jury, and we are not asked to consider the evidence with a view to a new trial.

The motion must, therefore, in my opinion, be dismissed with costs.

GALT, C. J., concurred.

G. F. H.

A DIGEST
OF
ALL THE CASES REPORTED IN THIS VOLUME
BEING DECISIONS IN THE
QUEEN'S BENCH, COMMON PLEAS, AND CHANCERY
DIVISIONS
OF THE
HIGH COURT OF JUSTICE FOR ONTARIO.

ACQUIESCENCE.

See MUNICIPAL CORPORATIONS, 8.

ADMINISTRATION.

Domicil—Domestic and Foreign Creditors — Priorities — Con. Rule 271.]—In the administration of the Ontario estate of a deceased domiciled abroad, foreign creditors are entitled to dividends *pari passu* with Ontario creditors.

Re Klæbe, 28 Ch. D. 175, followed.

Con. Rule 271, which came into force since the above decision, and which relates to service of initiatory process out of the jurisdiction, if applicable at all to such a case, merely relates to procedure, and does not affect a proceeding in which all the parties have attorned to the jurisdiction of the Court. *Milne v. Moore*, 456.

AGISTMENT.

See NEGLIGENCE.

ALIMONY.

See DIVISION COURT.

AMENDMENT.

See JUSTICE OF THE PEACE, 3—PROHIBITION, 2.

ANNUITY.

Apportionment—R. S. O. ch. 143, secs. 2, 5—Construction of Contract—Annuity Bond—Policy of Assurance.]—In consideration of \$12,000 paid by plaintiff's testator to the defendants, they, by an instrument in writing, agreed to pay him \$1,800 every year during his natural life,

in equal quarterly payments of \$450 each. The terms "policy" and "annuity bond" were both used in the document itself as descriptive of its nature. The consideration was stated to be not only the \$12,000, but "the application for this policy and the statements and agreements therein contained, hereby made a part of this contract;" and it was provided that upon certain conditions "this policy shall be void:"—

Held, in an action by his executors, that the instrument was not a policy of assurance within the exception in R. S. O. ch. 143, sec. 5, but an annuity bond; and that the money payable by the defendants under it was apportionable within sec. 2; and therefore the plaintiffs were entitled to recover a part of a quarterly instalment in proportion to the period between the last quarter day and the death of the testator. *Cuthbert et al. v. North American Life Assurance Company*, 511.

APPORTIONMENT.

See ANNUITY.

ARBITRATION AND AWARD.

1. *Contract—Superintendent of Work named as Arbitrator in Case of Dispute—Validity.*—By a contract between plaintiff and a city municipality for additions and improvements to its system of water-works, it was provided that all differences, etc., should be referred to the award, order, arbitrament, and final determination of H., the superintendent in charge of the said work:—

Held, that the fact of H. being such superintendent did not disqualify him from acting as arbitrator; and on the evidence that no cause existed to restrain him from proceeding with the reference. *McNamee v. The Corporation of the City of Toronto*, 313.

2. *Interest of Arbitrator—Employment as Counsel—Bias—Disqualification.*—Upon a motion to set aside an award of two out of three arbitrators, it was objected that one of the two, a Queen's counsel, was disqualified by reason of interest. It appeared that, for some years prior to the arbitration, he had from time to time acted as chamber counsel for the standing solicitor of a corporation, one of the parties to the arbitration, and had advised him with respect to matters affecting the corporation. It did not appear that he was the standing counsel for the corporation, nor for the solicitor in matters affecting the corporation, nor that he had advised or acted for the corporation or for the solicitor after his appointment as arbitrator, nor that there was any business connection between him and the corporation:—

Held, that there was no such relation between him and the corporation as might give rise to bias or shew an interest which would invalidate the award.

Vineberg v. Guardian Fire and Life Assurance Co., 19 A. R. 293, distinguished. *Re Christie and Town of Toronto Junction*, 443.

See WATERS AND WATERCOURSES.

ARREST.

See DAMAGES — TRESPASS.

ASSESSMENT AND TAXES.

1. *Municipal Corporations—Levy of Goods of Stranger—55 Vic. ch. 48, sec. 124 (O.).*—Premises in a city municipality were occupied, as tenants, by a firm of auctioneers, who, however, were not assessed in respect to them. Goods of the plaintiff left with the auctioneers to be sold by auction were distrained by the defendants for the taxes payable upon the premises for the current year :—

Held, that the distress was valid under sec. 124 of the Consolidated Assessment Act, 1892, 55 Vic. ch. 48 (O.). *Norris v. The Corporation of the City of Toronto*, 297.

2. *Special Provisions for Taking Assessment in Autumn—Levy in same Year—55 Vic. ch. 48, sec. 52 (O.).*—The “special provisions” in reference to municipal assessment contained in sec. 52 of the Consolidated Assessment Act, 1892, 55 Vic. ch. 48 (O.), do not permit such assessment to be levied for the current year, but the assessment so taken at the end of the year may be adopted by the council of the following year as the assessment on which the rate of taxation for such following year may be levied. *Dyer v. The Municipal Corporation of the Town of Trenton*, 303.

3. *Insurance Company—Reserve Fund—Interest on Investments of—55 Vic. ch. 48, sec. 34; ib., sec. 2, sub-sec. 10 (O.).*—Where the County Court Judge had decided, on appeal from the Court of Revision, that the plaintiffs were liable under sec. 34, and sec. 2, sub-sec. 10, of the Consolidated Assessment Act, 55 Vic. ch. 48, to be assessed upon the interest arising upon investments of their reserve fund, although such

interest was always added to the reserve fund and re-invested as part of it, and the plaintiffs now brought this action to have the assessment declared illegal :—

Held, that, although the plaintiffs were bound by law to keep up the reserve fund upon a certain scale, the amount varying according to the values of the lives insured by them, as fixed by actuaries’ tables, yet they were not bound to apply the income arising from the investments of the fund in keeping the fund at its proper level, but might make the necessary increase with any money whatever, and the Judge of the County Court had full jurisdiction, and the matter was, therefore, *res judicata*. *Confederation Life Association v. Corporation of the City of Toronto*, 643.

See TENANT FOR LIFE.

ASSIGNMENTS AND PREFERENCES.

See COMPANY, 1.

AWARD.

See ARBITRATION AND AWARD—WATERS AND WATERCOURSES.

BAIL.

See CRIMINAL LAW.

BAILMENT.

Warehouseman—Bailee for Hire—Collapse of Warehouse through Undiscovered Defect—Dry Rot—Liability.—A building erected for a bil-

liard table manufactory was converted into a warehouse and used as such for about nine months, when the rear portion of it collapsed through the breaking of a beam supporting the ground floor, occasioned by dry rot in one of the beams, and a quantity of goods stored therein was damaged. No negligence was shewn in the construction of the building or the selection of the material used therein, or in not discovering the existence of the dry rot, and except therefor the building would have been capable of sustaining the weight put on it, as the front portion with a greater weight in it remained intact.

In actions for the damages sustained to the goods warehoused in the building :—

Held, that the defendant was not liable. *Page v. Defoe, Brown v. Defoe, Ashdown v. Defoe*, 569.

See NEGLIGENCE, 1.

BASTARD.

Sufficient Evidence of Illegitimacy—Declaration of Deceased.] — In answer to a claim of heirship to one S., a witness, who had known him in England as a boy, before he came to Canada, alleged that S. had always been reputed to be illegitimate, and had been left by his mother on the parish, and that he had also known his reputed father, who bore a different surname. Another witness stated that S. had told him that one H. was his father, and that S. on his return from a visit to England said he had seen the place where his mother met with her misfortune :—

Held, sufficient evidence of illegitimacy to displace the claim of

heirship. *In re Stavelly—The Attorney-General for Ontario v. Brunsden*, 324.

BENCH WARRANT.

See TRESPASS.

BENEFIT SOCIETY.

See INSURANCE, 1, 3, 6—TRUSTS AND TRUSTEES.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

Transfer of Patent—Part Consideration—"Given for Patent Right"—53 Vic. ch. 33, sec. 30, sub-sec. 4 (D.).

—Where part of the consideration for the transfer of a patent right from one partner to another was the giving, at the plaintiffs' suggestion, of the notes of the firm for the individual debt of the transferor to the plaintiffs :—

Held, that under sub-section 4 of section 30 of the Bills of Exchange Act, 53 Vic. ch. 33 (D.), the words "given for a patent right" should have been written across the notes so given : and in the absence thereof the plaintiffs could not recover.—*Samuel et al. v. Fairgrieve et al.*, 486.

See CRIMINAL LAW

BILLS OF SALE AND CHATTEL MORTGAGES.

Interpleader—Possession after Default—Seizure by Sheriff—"Actual and Continued Change of Possession"—"Persons who become Creditors"—R. S. O. ch. 125, secs. 1 and 5—55 Vic. ch. 26, secs. 3 and 4].—

Where a sheriff seized goods under a writ of execution placed in his hands subsequently to the making of an unregistered chattel mortgage, and subsequently also to the mortgagee having, under the power therein in that behalf, taken possession of the goods, and having sold them to a purchaser, who had also gone into possession :—

Held, on interpleader, that the goods were not exigible by the sheriff, as against such purchaser.

“Actual and continued change of possession,” which by 55 Vic. ch. 26, sec. 3 (O.), is to be “open and reasonably sufficient to afford public notice thereof,” has reference only to the “actual and continued change of possession” mentioned in sections 1 and 5 of the Chattel Mortgage Act. R. S. O. ch. 125, and does not refer to possession taken by a mortgagee after default.

The words “persons who become creditors” in 55 Vic. ch. 26, sec. 4, mean persons who become execution creditors as provided for in section 2 of that Act, unless they are simple contract creditors suing on behalf of themselves and other creditors as provided for in section 2. *Gillard & Co. v. Bollert*, 147.

BUILDING LOAN.

See MORTGAGE, 3.

BY-LAW.

See MUNICIPAL CORPORATIONS, 2, 6, 7, 8—PUBLIC HEALTH—PUBLIC SCHOOLS, 2.

CASES.

Aldrich v. Aldrich, 23 O. R. 374, affirmed.]—See DIVISION COURT.

Askew v. Manning, 38 U. C. R. 345, 361, followed.]—See QUO WARRANTO.

Bate v. Canadian Pacific R. W. Co., 14 O. R. 625 ; 15 A. R. 388, considered.]—See RAILWAYS AND RAILWAY COMPANIES, 1.

Bunting v. Marriott, 19 Beav. 163, followed.]—See WILL, 4.

Chalmers v. Victors, 18 L. T. N. S. 481, followed.]—See GUARANTEE.

Clark v. Cullen, 9 Q. B. D. 355, followed.]—See PARTNERSHIP, 2.

Davey v. Lewis, 18 U. C. R. at p. 30, followed.]—See LANDLORD AND TENANT, 2.

Davies v. Mann, 10 M. & W. 546, applied and followed.]—See NEGLIGENCE, 2.

Donnelly, Re, 20 C. P. 165, followed.]—See JUSTICE OF THE PEACE, 3.

Fenelon Falls v. Victoria R. W. Co., 29 Gr. 4, followed.]—See MUNICIPAL CORPORATIONS, 1.

Gooderham v. City of Toronto, 21 O. R. 120 ; 19 A. R. 641, applied and followed.]—See MUNICIPAL CORPORATIONS, 1.

Hunter's License, Re, 24 O. R. 153, reversed.]—See INTOXICATING LIQUORS, 4.

Klaebe, Re, 28 Ch. D. 175, followed.]—See ADMINISTRATION.

Lynn, Re—Lynn v. Toronto General Trusts Co., 20 O. R. 475, followed.]—See INSURANCE, 2.

Meux v. Jacobs, L. R. 7 H. L. at pp. 490-1, followed.]—See LANDLORD AND TENANT, 2.

Mingaud v. Packer, 21 O. R. 267; 19 A. R. 290, followed.]—See INSURANCE, 3.

Murray v. Dawson, 17 C. P. 588, distinguished.]—See WATERS AND WATERCOURSES.

McDermid v. McDermid, 15 A. R. 287, specially referred to and considered.]—See PROHIBITION, 4.

Neill v. Carroll, incorrectly reported in 28 Gr. 339, followed.]—See LIEN, 3.

Ratcliffe v. Evans, [1892] 2 Q. B. 524, applied and followed.]—See RESTRAINT OF TRADE.

Regina v. Gordon, 23 Q. B. D. 354, considered.]—See CRIMINAL LAW.

Regina v. Johnston, 38 U. C. R. 549, followed.]—See JUSTICE OF THE PEACE, 2.

Regina v. Somers, 24 O. R. 244, followed.]—See JUSTICE OF THE PEACE, 3.

Regina v. Spain, 18 O. R. 385, followed.]—See JUSTICE OF THE PEACE, 3.

Regina v. Wallace, 4 O. R. 127, followed.]—See JUSTICE OF THE PEACE, 3.

Rex v. Danger, 1 Dears. & B. 307, 3 Jur. N. S. 1011, considered.]—See CRIMINAL LAW.

Regina v. Plummer, 30 U. C. R. 41, approved.]—See MUNICIPAL CORPORATIONS, 4.

Robb v. Murray, 16 A. R. 503, specially referred to and considered.]—See PROHIBITION, 4.

Prittie and Crawford, Re, 9 C. L. T. Occ. N. 45, declared to have been inadvertently decided or reported.]—See EXECUTION.

Stalker v. Dunwich, 15 O. R. 342, followed.]—See RESTRAINT OF TRADE.

Vineberg v. Guardian Fire and Life Assurance Co., 19 A. R. 293, distinguished.]—See ARBITRATION AND AWARD, 2.

Vogel v. Grand Trunk R. W. Co., 2 O. R. 197; 10 A. R. 162; 11 S. C. R. 612, considered.]—See RAILWAYS AND RAILWAY COMPANIES, 1.

Walker v. Murray, 5 O. R. 638, followed.]—See WILL, 3.

Wylson v. Dunn, 34 Ch. D. 569, dictum of Kekewich, J., in, not followed.]—See SPECIFIC PERFORMANCE.

CAUSE OF ACTION.

See FRAUDULENT CONVEYANCE.

CAUTION.

See DEVOLUTION OF ESTATES ACT, 1.

CERTIFICATE.

Of Electors on Application for Shop License.]—See INTOXICATING LIQUORS, 2, 4.

CERTIORARI.

See JUSTICE OF THE PEACE, 3—
MUNICIPAL CORPORATIONS, 6.

CHALLENGE.

See TRIAL, 3.

CHARITABLE USE.

See WILL, 6.

CHURCH.

See MARRIAGE—WILL, 4.

CIVIL PROCEEDING.

See QUO WARRANTO.

CLUB.

See INTOXICATING LIQUORS, 3.

COMPANY.

1. *Voluntary Assignment by—Application for Winding-up Order—Wishes of Creditors*—R. S. C. ch. 129, sec. 9—*Discretion of Court.*]—Section 9 of the Dominion Winding-up Act gives a wide discretionary power to the Court to grant or refuse a winding-up order; and where, upon an application for such an order it appeared that the company had previously made a voluntary assignment for the benefit of creditors, and that it was the desire of the great majority in number and value of the creditors that liquidation should be proceeded with under the assignment, the application was refused. *The Wakefield Rattan Company, Petitioners, v. The Hamil-*

ton Whip Company (Limited), Respondents, 107.

2. *Winding-up Act*—R. S. C. ch. 129—*Compromise—Dissentient Minority—Liquidator's Approval.*]—There is no power given by the Winding-up Act, R. S. C. ch. 129, to enforce a compromise upon dissentient minorities of creditors.

Semble, a liquidator cannot be compelled to consent to a compromise, and even when a compromise is recommended by a liquidator it may be frustrated by an opposing minority. *Re Sun Lithographing Co.*, 200.

3. *Increase of Capital Stock—Winding-up—Contributories—Surrender of Shares.*]—The charter of the company provided that the capital stock might be increased, if and when the original stock had been paid in full. When twenty per cent. had been paid on the latter, a by-law allowing a discount of eighty per cent. was passed, and then another by-law increasing the capital stock. By subsequent Act, 54 & 55 Vic. ch. 110 (D.), the "re-organization" of the company was recited, and the company, "as now organized," was declared capable of doing business:—

Held, in winding-up proceedings, that though the issue of the increased stock was irregular and illegal, yet the Act last referred to had validated it, and the holders of the new stock were liable as contributories.

Section 4 of the said Act provided that any shareholder might surrender his shares within a time limited, and that the said shares should be forfeited, and his liability in respect thereof should cease:—

Held, in winding-up proceedings,

that those who had thus surrendered their shares were not liable as contributories even to the extent of the ten per cent. which they ought to have paid at the time of subscription, but had not. *In re The Ontario Express and Transportation Company*, 216.

4. *Shareholders—Paid-up Stock—Moneys of Company in Hands of Shareholders—Action by Execution Creditor to Recover—Parties—Addition of—Rules 324, 326—Service on added Parties.*—Where the defendants agreed to take stock in a company about to be incorporated, and arranged that their interest in certain land acquired from them by the company should be applied in payment of their stock, and although it appeared that the company took the land over at a price considerably beyond that at which it was acquired by the defendants, yet no fraud being shewn, it was :—

Held, that the shares of stock issued to the defendants, pursuant to the arrangement, upon the incorporation of the company, as fully paid-up shares, must be treated as such in an action by an execution creditor of the company seeking to make the defendants liable upon their shares for the amount unpaid thereon.

The law upon that subject is the same in this Province as that of England prior to the Companies' Act, 30 & 31 Vic. ch. 131.

The plaintiff sought also to recover from the defendants moneys shewn to be in their hands which were really the property of the company :—

Held, that the plaintiff was entitled to judgment against the defendants for payment to him of such moneys; but the company were

necessary parties to the action; and their consent to being added as plaintiffs not having been filed as required by Rule 324 (b), they should be added as defendants :—

Held, also, a proper case, under Rules 324 (c), and 326, for dispensing with service upon the company, as the defendants already before the Court were directors and the principal shareholders in the company. *Jones v. Miller et al.*, 268.

5. *Shares—Assignment “in trust” —Surrender—54 & 55 Vic. ch. 110, sec. 4 (D.).*—By 54 & 55 Vic. ch. 110, sec. 4 (D.) power was given to any shareholder of the company to surrender his stock by notice in writing within a certain time. A shareholder, desiring to surrender his stock, transferred it within the time by an ordinary assignment to the president “in trust,” both intending the transfer to operate as a surrender :—

Held, a valid surrender. *Harte v. The Ontario Express and Transportation Company. Kirk and Marling's Case*, 340.

6. *Winding-up—Insurance Corporations Act, 1892—Interim Receiver—Insufficient Security—Contempt of Court—Authority of Master.*—A Master of the High Court has no authority under the provisions of the Insurance Corporations Act, 1892, to direct security to be given by an officer of a company being wound up, in place of an insufficient security already given by such officer. Section 54, sub-sections 5 and 7, merely provide for the giving of security as interim receiver, which may be made a condition of retention in that office, but default in giving which cannot be punished by imprisonment for contempt. *Re*

Dominion Provident, Benevolent, and Endowment Association, 416.

See DEFAMATION, 1—INSURANCE, 5—INTOXICATING LIQUORS, 3.

COMPROMISE.

See COMPANY, 2.

CONSENT.

See JUSTICE OF THE PEACE, 1—PRINCIPAL AND SURETY, 2.

CONSIDERATION.

See NOTICE.

CONSPIRACY.

See CRIMINAL LAW.

CONTEMPT OF COURT.

See COMPANY, 6.

CONTRACT.

See ARBITRATION AND AWARD, 1—LIEN, 2—MUNICIPAL CORPORATIONS, 9—RAILWAYS AND RAILWAY COMPANIES, 1—SPECIFIC PERFORMANCE.

CONTRIBUTION.

See PRINCIPAL AND SURETY, 2.

CONTRIBUTORIES.

See COMPANY, 3.
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CONVERSION.

See WILL, 2, 5.

CONVICTION.

See JUSTICE OF THE PEACE, 1, 2, 3—MARRIAGE—MEDICAL PRACTITIONER—MUNICIPAL CORPORATIONS, 4, 6, 7—PUBLIC HEALTH.

COSTS.

See DEVOLUTION OF ESTATES ACT, 3—JUSTICE OF THE PEACE, 2, 3—PROHIBITION, 3—WILL, 6.

COUNSEL.

See ARBITRATION AND AWARD, 2.

COUNTY COURT JUDGE.

See WATERS AND WATERCOURSES.

COURTS.

Motion for Information in Nature of Quo Warranto.—See QUO WARRANTO.

COVENANT.

See LANDLORD AND TENANT, 4—MORTGAGE, 2—RESTRAINT OF TRADE.

CREDITORS.

See ADMINISTRATION—COMPANY, 1.

CRIMINAL LAW.

Speedy Trials Act—Bail Surrendering—Right to Elect to be Tried Summarily—Subsequent Indictments Quashed—Several Offences—Valuable Security.—The surrender of defendants out on bail, including the surrender by a defendant himself out on his own bail, committed to gaol for trial, has the effect of remitting them to custody, and enables them to avail themselves of the Speedy Trials Act, 52 Vic. ch. 47 (D.), and to appear before the County Judge and elect to be tried summarily; and where defendants had so elected, indictments subsequently laid against them at the assizes were held bad and quashed, even after plea pleaded where done through inadvertence, sec. 143 of R. S. C. ch. 174 not being in such case any bar.

Two indictments were laid against defendants, one for conspiracy to procure W. to sign two promissory notes; and the other for fraudulently inducing W. to sign the documents representing them to be agreements, whereas they were in fact promissory notes:—

Held, that several offences were not set up in each count of the indictments; that it was no objection to the indictments that the notes might not be of value until delivered to defendants; and further, that under sec. 78 of R. S. C. ch. 164, an indictment would lie for inducing W. to write his name on papers which might afterwards be dealt with as valuable securities.

Rex v. Danger, 1 Dears. & B. 307, 3 Jur. N. S. 1011; *Regina v. Gordon*, 23 Q. B. D. 354, considered. *Regina v. Burke et al.*, 64.

See JUSTICE OF THE PEACE GENERALLY—WILL, 1.

DAMAGES.

Measure of—Trespass to the Person—Arrest before Indorsement of Warrant—Detention After.—A warrant for the arrest of the plaintiff, who had made default in paying a fine on conviction for an infraction of the liquor license law, was sent from an outlying county to a city. Before it was indorsed by a magistrate in the city the plaintiff was arrested there by two of the defendants, the chief constable and a detective, and confined. Some hours after the arrest the warrant was properly indorsed and the detention of the plaintiff was continued until payment of the fine:—

Held, that the only damages recoverable by the plaintiff were for the trespass, up to the time of the backing of the warrant:—

Held, also, that the plaintiff being illegally in custody under a criminal charge, his subsequent detention on a similar charge under a proper warrant was lawful.

Distinction between subsequent civil and criminal proceedings in such cases pointed out. *Southwick v. Hare et al.*, 528.

See RESTRAINT OF TRADE—STREET RAILWAYS, 1—TRESPASS.

DECLARATORY JUDGMENT.

See MUNICIPAL CORPORATIONS, 1.

DEED.

Reformation of—Mortgage—Dower—Omission to Bar—Voluntary Deed—Consideration.—A voluntary deed will not be reformed against the grantor.

And where the defendant's husband, having appropriated moneys of a client in his hands for investment, secretly executed in the client's favour, a statutory mortgage not containing a bar of dower, the defendant being a party to and executing the mortgage, and subsequently after her husband's death paying, with knowledge of the facts, an instalment of interest due under it, an action to reform the mortgage by inserting a proper bar of dower was dismissed, there being no consideration to support a contract by the defendant with the plaintiffs to bar her dower. *Bellamy et al. v. Badgerow*, 278.

See NOTICE.

DEFAMATION.

1. *Libel—Impugning the Validity of Election of Directors of a Corporation—Libel on a Corporation.*—The defendant published of the directors of the plaintiffs, an incorporated building society, in a newspaper, a notice stating, amongst other matters, that "certain persons representing themselves to be directors of the society had been self-appointed by the most despicable, foul, and fraudulent means, and in consequence, all business transacted by them * * is wholly and entirely contrary to rules and regulations and law:—"

Held, that the paragraph was capable of the meaning attributed to it, namely, that the business of the society was being illegally transacted, and as such it was defamatory of the plaintiffs. *Owen Sound Building and Savings Society v. Meir*, 109.

2. *Slander—Words of Abuse Impugning Crime—Understanding of Bystanders—Undisclosed Intention.*]

—In an action of slander for saying of the plaintiff on a public street in the presence of a number of people "you are a perjured villain and I can put you behind the bars, you are a forger and I can prove it," the trial Judge left it to the jury to say whether in their opinion the defendant was really charging the plaintiff with having committed the crimes mentioned:—

Held, misdirection, and a new trial was ordered.

What should have been left to the jury was whether or not the circumstances were such that all the bystanders would understand that the defendant did not mean to charge the plaintiff with the commission of the crime according to what he actually said, the undisclosed intention of the defendant in this respect having nothing to do with the question and being wholly immaterial. *Johnston v. Ewart*, 116.

See EVIDENCE.

DEMURRER.

See FRAUDULENT CONVEYANCE.

DETENTION.

See LANDLORD AND TENANT, 2.

DEVISE.

See DEVOLUTION OF ESTATES ACT, 1—WILL, 1, 5, 6.

DEVOLUTION OF ESTATES ACT.

1. *Mortgage by Devisee within twelve months from Death—Absence of Caution—R. S. O. ch. 108—54 Vic. ch. 18 (O.)—56 Vic. ch. 20 (O.).*

—The devisee of real estate under the will of a testator, subject to the Devolution of Estates Act and amendments, has a transmissible interest in the lands during the twelve months after the death of the testator, pending which time they are vested by the Act in the legal personal representatives.

And where real estate devised by a will so subject, of which letters of administration with the will annexed had been granted during the twelve months succeeding the testator's death, but as to which no caution had ever been registered, was, during such period, mortgaged by the devisee in good faith:—

Held, that the mortgage was operative between the devisee and the mortgagee when made, and became fully so as to the land and against the personal representatives when the year expired, in the absence of any warning that it was needed for their purposes. *Re McMillan, McMillan v. McMillan et al.*, 181.

2. *Lease—Covenant to Renew—Power of Executor of Lessor to Execute Renewal of Lease.*—Under the Devolution of Estates Act the executor of a deceased lessor can make a valid renewal of a lease pursuant to the covenant of the testator to renew. *Re The Canadian Pacific Railway Company and the National Club*, 205.

3. *R. S. O. ch. 108, sec. 9—54 Vic. ch. 18, sec. 2 (O.)—Powers of Executor—Exchange of Lands—Contract—Specific Performance—Costs.*

—An executor or administrator cannot, having regard to R. S. O. ch. 108, sec. 9, and 54 Vic. ch. 18, sec. 2 (O.), make the lands of the testator or intestate the subject of speculation or exchange by him in the same manner as if the lands were his own.

The Court refused to decree specific performance of a contract by an executor to exchange lands of his testatrix for other lands, as the purpose of the exchange could not have been the payment of debts or the distribution of the estate, and it was shewn that the beneficiaries objected to the exchange, and it did not appear that the official guardian had been consulted.

Costs withheld from the defendant because he had misled the plaintiff as to his power to make the exchange, and declined to perform his contract on grounds some of which were untenable, and also alleged fraud which he failed to prove. *Tenute v. Walsh*, 309.

DIRECTORS OF COMPANY.

Defamation of.—See DEFAMATION, 1.

DISCRETION.

Of Court under Dominion Wind-ing-up Act.—See COMPANY, 1.

DISTRESS.

See ASSESSMENT AND TAXES, 1—LANDLORD AND TENANT, 3.

DITCHES AND WATERCOURSES ACT.

See WATERS AND WATERCOURSES.

DIVISION COURT.

Jurisdiction—Action on Judgment of High Court—Final Judgment—Abandoning Excess—R. S. O. ch. 51, sec. 70 (b).—In an action for alimony the plaintiff recovered judgment against the defendant for \$211.39 taxed costs, and for alimony at the rate of \$226 per year, payable quarterly. After two instalments of alimony had fallen due and were unpaid, she entered suit for \$100 in the Division Court in respect to the costs, which were also unpaid, abandoning the balance of the costs and the overdue alimony:—

Held, affirming the decision of FERGUSON, J., 23 O. R. 374, that the Division Court had jurisdiction under R. S. O. ch. 51, sec. 70 (b). *Aldrich v. Aldrich*, 124.

See PROHIBITION GENERALLY—TRIAL, 1.

DOMICIL.

See ADMINISTRATION—WILL, 3.

DOWER.

See DEED—WILL, 6.

DRAINAGE.

See MUNICIPAL CORPORATIONS, 2,
5—WATERS AND WATERCOURSES.

EJECTMENT.

See LANDLORD AND TENANT, 3.

ELECTION.

See PARTNERSHIP—WILL, 6.

ENGINEER.

See MUNICIPAL CORPORATIONS, 5.

ESTOPPEL.

See PARTNERSHIP.

EVIDENCE.

Libel—Publication—Defendant Claiming Privilege—Tendency to Criminate—Misdirection.—In an action for libel it was claimed that the defendant had, as a correspondent at T. of a newspaper, furnished several items which included one reflecting on the plaintiff. In his examination for discovery defendant, while admitting he was a correspondent at T., could not say whether he was the only one; and alleged that he did not remember sending any of the items; but might possibly have sent some of them; but he did not think he had sent the one complained of; that he had had since the publication an interview with the editor with reference thereto, but he refused to answer whether he had discussed the item complained of, for fear, as he said, of incriminating himself. At the trial he stated he had since ascertained that there were other correspondents at T., and on being pressed as to the item complained of, after some hesitation, said he did not furnish it. No other evidence was given connecting the defendant with the publication:—

Held, that this did not constitute any evidence of publication to go to the jury.

The trial Judge in his charge, after referring to the defendant's refusal to answer on his examination

for discovery, and to his reason for refusing, told the jury that they might draw the inference as to what the true answer would have been:—

Held, misdirection, and that no inference adverse to the defendant should have been drawn from his refusal to answer. *Nunn v. Brandon*, 375.

See BASTARD—FRAUDULENT CONVEYANCE—INSURANCE, 1—JUSTICE OF THE PEACE, 3—PARTNERSHIP.

EXECUTION.

Fi. fa. Lands—Specific Performance—Equitable Interest of Purchaser under Contract—Judgment against Assignee of such Purchaser—R. S. O. ch. 64, sec. 25.—The equitable interest of an assignee from the purchaser of a contract for the sale of lands, is exigible under a writ of *fi. fa.* against the lands of such assignee, and the purchaser at a sheriff's sale of such interest is entitled to specific performance of the contract.

Re Prittie and Crawford, 9 C. L. T. Occ. N. 45, declared to have been inadvertently decided or reported. *Ward v. Archer*, 650.

See BILLS OF SALE AND CHATTEL MORTGAGES.

EXECUTORS AND ADMINISTRATORS.

Will—Blended Fund—Power of Sale—Executor of Surviving Executor.—A testator by his will directed his real and personal property to be sold and the proceeds to be divided and distributed, and appointed two executors to carry out

his will, both of whom died before the estate was realized:—

Held, that the executor of the last surviving executor of the testator's will had power to sell and convey the lands. *Re Stephenson, Kinnee et al. v. Malloy et al.*, 395.

See DEVOLUTION OF ESTATES ACT, 2, 3—INSURANCE, 2, 3—WILL, 6.

EXTRAS.

See LIEN, 2.

FELONY.

See WILL, 1.

FIXTURES.

See LANDLORD AND TENANT, 2.

FORFEITURE.

See LANDLORD AND TENANT, 2, 3.

FRAUD.

Allegation of and Failure to Prove by Successful Party.—See DEVOLUTION OF ESTATES ACT, 3.

FRAUDULENT CONVEYANCE.

Action to Set Aside—Plaintiff not an Execution Creditor—Appropriate Relief—Demurrer to Relief Prayed—Rule 384—13 Eliz. ch. 5—Status of Plaintiff—Claim upon Implied Contract to pay Mortgage—Proof of Contract—Voluntary Conveyance—Fraudulent Intent.—1.

Where a creditor brings his action to set aside as fraudulent a conveyance made by his debtor of his property, without first obtaining judgment and execution, he must sue on behalf of all the creditors of the debtor, and in such action his relief will be confined to setting aside the conveyance, leaving him to resort to some independent proceeding to obtain execution against the property comprised in such conveyance.

2. A demurrer to the relief prayed in respect of the cause of action, and not to the cause of action itself, will not now be allowed. Rule 384 referred to.

3. The protection of 13 Eliz. ch. 5 is not confined to creditors only, but extends to creditors and others who have lawful actions; and in this case, where, before the impeached conveyance was made, all the moneys secured by a mortgage, subject to which the plaintiff had conveyed the mortgaged lands to the fraudulent grantor, had fallen due, the plaintiff had at the time of the making of the conveyance a lawful action upon the implied contract of his vendee to pay the moneys secured by the mortgage; and this implied contract was sufficiently proved against the fraudulent grantee by proof of the mortgage and of the conveyance by the plaintiff to the fraudulent grantor subject to the mortgage.

4. Where a conveyance is voluntary, it is only necessary to shew fraudulent intent on the part of the grantor. *Oliver v. McLaughlin et ux.*, 41.

FROG.

See RAILWAYS AND RAILWAY COMPANIES, 2.

GUARANTEE.

Construction of.—A guarantee in the following words, "I hereby become responsible to H. M. for payment for goods sold to F. E. for feed store situate * * up to \$400," was given at a time when the debt due by F. E. to H. M. was \$280.85 :—

Held, that the guarantee covered the amount then due and an additional indebtedness up to \$400.

Chalmers v. Victors, 18 L. T. N. S. 481, followed.

Decision of ARMOUR, C. J., at the trial affirmed. *Moyle v. Edmunds et al.*, 479.

HIGH SCHOOLS.

See QUO WARRANTO.

HIGHWAY.

See MUNICIPAL CORPORATIONS, 1, 4.

HUSBAND AND WIFE.

Married Woman—Separate Estate—Contract respecting.—A married woman, having been informed by a relative that he had made his will in her favour, signed a promissory note three days after his death, before she had seen the will and some weeks before it was proved. The will gave her a vested interest in the property bequeathed :—

Held, that she was possessed of separate estate, and had contracted with respect to it. *Mulcahy v. Collins et al.*, 441.

See INSURANCE, 4—MARRIAGE.

ILLEGITIMACY.

Sufficient evidence of.]—*See* BASTARD.

IMPRISONMENT.

See TRESPASS.

INFORMATION.

See QUO WARRANTO.

INJUNCTION.

See MUNICIPAL CORPORATIONS, 1
—PUBLIC SCHOOLS, 1.

INSURANCE.

1. *Life—Benefit Society—Expulsion of Member—Fair Trial—Report of Committee—Evidence not before Committee—Absence of Member.*]—The plaintiff, as executor of his deceased son, sued the defendants, an incorporated benefit society, to recover the money benefit accruing upon the death of a member. Before the death the defendants had passed a resolution removing the son from the list of members, on the ground that he had given untruthful answers to questions as to his state of health put to him upon his admission. The complaints against him had been referred to the committee of management, who had reported in his favour, but the society at a meeting refused to adopt the report, and, in the absence of the deceased, without any notice to him or opportunity of appearing, accepted an *ex parte* statement made by a member present at the meeting,

which had not been before the committee, and acted upon it by forthwith passing the resolution referred to. By the rules of the society it was provided that if it should be established that a new member had not answered truthfully, he should *ipso facto* be excluded from the society; and also that if it was proved after his admission that he had not answered truthfully, he should, by reason thereof, be struck off the list of members. The committee of management was the body appointed under the rules to take the evidence and find the facts, their report being subject to confirmation or rejection by the society:—

Held, that, upon the principles governing such an inquiry, the person accused should not be condemned without a fair chance of hearing the evidence against him, and of being heard in his own defence; that the action of the defendants was contrary to these principles and to their own rules; and, therefore, the expulsion was not legally accomplished, and the plaintiff was entitled to recover. *Gravel v. L'Union St. Thomas*, 1.

2.—*Life—Will—Benefit of Wife and Children—Devise to Executors—Creditors' Rights—R. S. O. ch. 136.*]—Two policies on his life were bequeathed by a testator to his executors to be invested by them as a provision for his wife and children:

Held, that the testator had declared the insurance to be for the benefit of his wife and children within the meaning of R. S. O. ch. 136, and therefore the proceeds were exempt from the claims of creditors.

Re Lynn—Lynn v. The Toronto General Trusts Co., 20 O. R. 475, followed. *Beam v. Beam et al.*, 189.

3. *Life—Benefit Certificate—Change of Direction as to Payment—Trust—Revocation—Will—Executors—R. S. O. ch. 136—51 Vic. ch. 22 (O.)—53 Vic. ch. 39 (O.)*—In October, 1886, an endowment certificate upon the life of a widower with one child was issued to him by a benefit society, the sum secured thereby being designated by a clause therein as payable to the child. In February, 1888, the insured, having married again, indorsed on the certificate a writing revoking the original designation and directing payment to his wife. In November, 1890, his wife having died, he indorsed on the certificate a direction that payment should be made to his executors, administrators, and assigns. He died in March, 1893, a widower, leaving two children, the one first mentioned, and one born in May, 1888. By his will, dated in July, 1888, he left all his estate to his children in equal shares:—

Held, that under the powers conferred by R. S. O. ch. 136, even as amended by 51 Vic. ch. 22, the insured had only a limited authority to vary the terms of the certificate; and he could not revoke the direction for payment to his daughter and make a direction for payment to his wife.

Mingeaud v. Packer, 21 O. R. 267; 19 A. R. 290, followed.

By virtue of 53 Vic. ch. 39, sec. 6, he might, when he made the indorsement of November, 1890, have transferred or limited the benefits of the certificate in any manner or proportion he saw fit between his children; but he could not destroy the trust created by the certificate and declare a new trust which might, by making the fund applicable to the payment of debts, de-

prive his children of all benefit in it, and so render the Act nugatory. *Neilson v. Trusts Corporation of Ontario*, 517.

4. *Life—Policy on Husband's Life for Benefit of Wife—Assignment by Wife—Separate Estate—R. S. O. ch. 136, secs. 5, 6.*—The interest of a wife in a policy effected by her husband on his own life, and which has been declared by him to be for her benefit, under section 5 of the Act, to secure to wives and children the benefit of life insurance, is her separate estate, and may, in her husband's lifetime, be assigned by her. The assignee, under such an assignment, will be entitled to claim thereunder, subject to the exercise by the husband of the powers conferred on him by section 6 of the Acts and amendments. *Graham v. Canada Life Assurance Company*. *Proctor v. Graham*, 607.

5. *Life—Mutual Insurance Company—Policy—Winding-up—Cancellation—Assessment—R. S. O. ch. 167, sec. 114, sub-sec. 19.*—A resolution for the voluntary liquidation of a Mutual Insurance Company under the Ontario Winding-up Act was adopted at a general meeting on a report of directors, which contained a recommendation that policies be sent in to the liquidator, and that members seek insurance elsewhere. One of the policy holders sent in his policy accordingly, but no notice of actual cancellation was given to him, nor was anything further done in reference to cancellation. Afterwards an assessment was made upon the policy by the directors with the concurrence of the liquidator:—

Held, that the policy had not been cancelled, and the assessment was good. *In re City Mutual In-*

urance Company—*Steifelmeyer's Case*, 100.

6. *Life — Benevolent Society — Endowment Certificate — Change of Beneficiary—Evidence of.*]—An endowment certificate issued in 1889 by a benevolent society to a member, and payable on his death, half to his father and to his mother, contained a provision that should there be any change in the name of the payee, the secretary should be notified, and an indorsement thereof made on the certificate. The member subsequently married, when he informed his wife that he would have the certificate changed, as he intended it for her, giving her the certificate, which she deposited in a trunk used by both in common, he continuing to pay the premium:—

Held, that this was not sufficient to displace the terms of the contract, as manifested on the face of the certificate; and, further, so far as the mother was concerned, she was amply protected, 53 Vic. ch. 39, sec. 5 (O.), which applied to the certificate in question, creating a trust in her favour.

That statute is retrospective as to current policies, issued before it came into force. *Simmons v. Simmons*, 662.

See ANNUITY—ASSESSMENT AND TAXES, 3—COMPANY, 6—TRUSTS AND TRUSTEES.

INTEREST.

See ASSESSMENT AND TAXES, 3—MORTGAGE, 1—PRINCIPAL AND SURETY, 1—WILL, 6.

INTERPLEADER.

See BILLS OF SALE AND CHATTEL MORTGAGES.

INTOXICATING LIQUORS.

1. *Sale of Liquor—R. S. O. ch. 194, sec. 131—Search Warrant—Sufficiency of Place to be Searched, and Persons to make it.*]—A search warrant issued under section 131 of the Liquor License Act, R. S. O. ch. 194, after reciting an information laid by a police inspector, that there was reasonable ground for the belief that spirituous, etc., liquor was being unlawfully kept for sale or disposal contrary to the said Act, in a certain unlicensed house or place, namely, in the house and premises of the Toronto Industrial Exhibition Association, directed the city license inspectors, city constables, or peace officers, or any of them, to search the said house and premises, and every part thereof, or of the premises connected therewith. In attempting to search defendant's booth, which was described as being under the old grand stand on the exhibition premises, a police sergeant who accompanied the inspector was obstructed by defendant. The evidence did not shew there was any other booth on the premises:—

Held, that the warrant was valid; that it was sufficiently definite as to the place to be searched and the persons directed to make it. *Regina v. McGarry*, 52.

2. *Liquor License Act—Certificate of Electors—Omission to File in Proper Time—Revocation of License—R. S. O. ch. 194, sec. 11, sub.-sec. 14—Ib., sec. 91—53 Vic. ch. 39, sec. 1.*]—The contravention of the provisions of the Liquor License Act, R. S. O. ch. 194, provided for in sec. 91, must be a wilful or knowing contravention.

Where it appeared that the appli-

cant for a license acted throughout in good faith, but omitted to file before 1st April, with the application, the certificate of the electors required by R. S. O. ch. 194, sec. 11, sub-sec. 14, as amended by 53 Vic. ch. 56, sec. 1; and the board of commissioners, after a fair hearing of the application and all objections made against it, including the omission of the said certificate, which had not been filed until 25th April, in good faith and according to the best of their judgment, granted the license, and the Judge of the County Court adjudged that the license so granted should be revoked, the licensee thereby incurring the penalty of disqualification, prohibition was granted.

The provision that the certificate shall accompany the application at the time of the filing is peremptory. *In the Matter of Robert H. Hunter's License*, 153.

(See No. 4, *infra*.)

3. *Liquor License Act—Driving Park—Club—Selling Liquor without License—Locality of.*—A company was incorporated under the Joint Stock Letters Patent Act, R. S. O. ch. 157, for establishing a driving park to improve the breed of horses, etc., and for such purposes to acquire a certain named property, with power to erect a club house, and, subject to the Liquor License Act, to maintain and rent or lease same, for social purposes, etc.; and generally to do all things incidental or conducive to the objects aforesaid:—

Held, that the charter did not authorize the company to have a club house at any other place than that specified in the charter; and where, therefore, the defendant was

found in possession of and selling liquor at another place, though claimed to be a club constituted under the charter, and of which the defendant claimed to be the secretary, he was properly convicted under section 50 of the Liquor License Act, R. S. O. ch. 194, for unlawfully keeping liquor for sale, barter, or traffic, without a license. *Regina v. Charles*, 432.

4. *Shop License—Application for—Certificate of Electors—Liquor License Act—53 Vic. ch. 56, sec. 1 (O.).*—On an application for a shop license under sub-section 14 of section 11 of the Liquor License Act, R. S. O. ch. 194, as amended by 53 Vic. ch. 56, sec. 1 (O.), it is imperative that the petition which is to be filed with the inspector before 1st April, be accompanied by a properly signed certificate of the majority of the electors, and the Act does not authorize the granting of such a license contrary to the provisions of that section.

Semble, it is otherwise as to a tavern license, in which case a discretion rests with the commissioners.

Decision of MEREDITH, J., *supra*, No. 2, reversed. *In the Matter of Robert H. Hunter's License*, 522.

JUDGMENT.

See DIVISION COURT—PARTNERSHIP—PROHIBITION, 3.

JURISDICTION.

Of Master of High Court.—*See* COMPANY, 6.

Of Division Court.—*See* DIVISION COURT—PROHIBITION, 1, 2, 3, 4—TRIAL, 1.

Of Police Magistrate.—See TRESPASS.

JURY.

See TRIAL, 1, 2, 3.

JUSTICE OF THE PEACE.

1. *Summary Trials Act—Trial of Defendant for Felony without Consent—Conviction—Quashing.*—The defendant, on being charged before a stipendiary magistrate with felonious assault, pleaded guilty to a common assault, but denied the more serious offence. The magistrate, without having complied with the requirements of section 8 of the Summary Trials Act, R. S. C. ch. 176, by asking defendant whether he consented to be tried before him or desired a jury, proceeded to try and convicted the defendant on the charge of the felonious assault:—

Held, that the defendant was entitled to be informed of his right to trial by a jury, and that the conviction must be quashed.

Where a statute requires something to be done in order to give a magistrate jurisdiction, it is advisable to shew, on the face of the proceedings, a strict compliance with such direction. *Regina v. Hogarth*, 60.

2. *Summary Conviction—Lord's Day Act, R. S. O. ch. 203—Cab-driver—Offence—Uncertainty—Costs.*—A cab-driver is not within any of the classes of persons enumerated in section 1 of the Lord's Day Act, R. S. O. ch. 203, and cannot be lawfully convicted thereunder for driving a cab on Sunday.

Conviction of the defendant under

the Act for unlawfully exercising the worldly business of his ordinary calling as a cab-driver on the Lord's day:—

Held, bad for uncertainty.

The practice is not to give costs on quashing a conviction.

Regina v. Johnston, 38 U. C. R. 549, followed. *Regina v. Somers*, 244.

3. *Summary Conviction—Certiorari—Evidence—Uncertainty—Amendment—Ontario Medical Act, R. S. O. ch. 148, sec. 45—Practising Medicine—Quashing Conviction—Costs.*—Where a summary conviction, valid on its face, has been returned with the evidence upon which it was made, in obedience to a *certiorari*, the Court is not to look at the evidence for the purpose of determining whether it establishes an offence, or even whether there is any evidence to sustain a conviction.

Regina v. Wallace, 4 O. R. 127, followed.

But where a conviction for an offence over which the magistrate had jurisdiction, is bad on its face, the Court is to look at the evidence to determine whether an offence has been committed, and if so, it should amend the conviction.

A conviction under the Ontario Medical Act, R. S. O. ch. 148, sec. 45, for practising medicine for hire:—

Held, bad for uncertainty in not specifying the particular act or acts which constituted the practising.

Re Donnelly, 20 C. P. 165; *Regina v. Spain*, 18 O. R. 385; and *Regina v. Somers*, ante p. 244, followed.

And the Court refused to amend, and quashed the conviction, where the practising consisted in telling a man which of several patent medicines sold by the defendant was suitable to the complaint which the man

indicated, and selling him some of it.

Costs against the informant refused.

Regina v. Somers, *supra* No 2, followed. *Regina v. Coulson*, 246

See MEDICAL PRACTITIONER—MUNICIPAL CORPORATIONS, 4, 6, 7—PUBLIC HEALTH—TRESPASS.

LANDLORD AND TENANT.

1. *Surrender at Law—Whether of whole or part of Lands Demised.*—A lease to defendant, dated 1st April, 1885, for ten years, at an annual rent of \$120, payable quarterly in each year, contained a provision enabling the lessee to determine the lease by giving three months' notice in writing before 1st January in any year. The defendant for his own business only occupied part of the premises, and subleased the remainder. In November, 1891, the part subleased by defendant being unoccupied, defendant verbally notified the lessor that unless the premises were repaired he would have to surrender. The lessor treated this as a valid notice under the lease, and after negotiations with defendant it was agreed that defendant should have the portion of the premises occupied by him at \$24 a year, to take effect on 1st April following, but with a right to the lessor, should he sell, to cancel the same :—

Held, that what had taken place constituted a surrender in law of the whole of the premises, and not merely of the part not occupied by defendant. *Seldon et al. v. Buchanan*, 349.

2. *Fixtures—Machinery—Removal of—Provisions of Lease—Chattels*

—*Forfeiture of Term—Action to Recover Possession of Goods—Evidence of Detention.*—Where a trade fixture is attached to the freehold, it becomes part thereof, subject to the right of the tenant to remove it if he does so in proper time ; in the meantime it remains part of the freehold.

Meux v. Jacobs, L. R. 7 H. L. at pp. 490, 491, followed.

But where the parties have made a special contract, they have defined and made a law for themselves on the subject.

Davey v. Lewis, 18 U. C. R. at p. 30, followed.

In a lease dated in July, 1890, there was a provision that the lessees might, during the term, erect machinery upon the demised premises, which should be the property of the lessees and removable by them, but not so as to injure the building, etc. The lessees affixed machinery to the building demised, and afterwards, in April, 1892, made an assignment for the benefit of creditors. The lessors elected to forfeit under a clause in the lease, but they permitted M. G., a purchaser of the machinery from the lessees' assignee, to remain in possession, paying rent, until December, 1892, when she ceased, leaving the machinery on the premises. The defendants became the purchasers of the freehold by virtue of a sale under the power in a mortgage in July, 1892, but the lease had come to an end before their title commenced. The plaintiffs claimed the machinery under a chattel mortgage made by M. G. on the 25th April, 1892, and a subsequent assignment from her of the whole of her interest therein, and in March, 1893, they brought this action to obtain possession :—

Held, that the machinery was,

owing to the provisions in the lease, chattels, and the property of the lessees, and continued to be so until they made the assignment, when it passed as chattels to their assignee, who transferred it as chattels to M. G., and she to the plaintiffs; that the forfeiture of the term did not affect the right to the property nor the right to remove it; that nothing had taken place to defeat that right, and the plaintiffs were in good time to exercise it.

The defendants, being in possession of the machinery, and being asked for it by the plaintiffs, asserted title in themselves, and warned the plaintiffs that if proceedings were taken they would set up such title:—

Held, that a wrongful detention of the goods was shewn, and that the action of replevin therefore lay. *Scarth et al. v. The Ontario Power and Flat Company*, 446.

3. *Notice of Forfeiture—R. S. O. ch. 143, sec. 11, sub-sec. 1—Distress after Ejectment brought—Effect of.*—A notice of forfeiture of a lease under R. S. O. ch. 143, sec. 11, sub-sec. 1, given in the words “You have broken the covenants as to cutting timber, etc.,” without more particularly specifying the breach and claiming compensation, is sufficient.

After an action of ejectment was commenced for the forfeiture of the lease the landlord distrained for and received rent subsequently accruing due:—

Held, that such course did not *per se* set up the former tenancy, which ended on the election to forfeit manifested by the issue of the writ, but might be evidence for the jury of a new tenancy on the same terms from year to year. *McMullen v. Van-atto et al.*, 625.

4. *Indorsement on Lease to Lease other Premises at the same Rent—Construction of—Negligence—Fall of Verandah—Liability of Landlord to Daughter of Tenant—Member of Family—Stranger.*—A lessee of house No. 107 signed an indorsement on the lease that he would lease house No. 109 at the same rent, he getting possession as soon as premises were vacated by the then tenants, which indorsement, however, was not signed by the lessor:—

Held, that from the time of his getting possession of No. 109, the lessee held it on the same terms as No. 107, and all the terms and covenants in the lease of the latter, barring the time of getting possession and the consequent difference in the length of the terms, applied to the letting of No. 109.

The lessee had covenanted with the lessor to keep the premises in repair, and his daughter, living with him at the time of the accident, was injured by the fall of a verandah attached to the building:—

Held, that the daughter had no right of action for damages on account of the accident against the lessor, nor could she be considered as standing in the position of a stranger. *Mehr v. McNab*, 653.

See MUNICIPAL CORPORATIONS, 3.

LAPSE.

See WILL, 1.

LEASE.

Renewal by Executor of Lessor.—See DEVOLUTION OF ESTATES ACT, 2—LANDLORD AND TENANT GENERALLY.

LEGACY.

See WILL, 3.

LIBEL.

See DEFAMATION, 1—EVIDENCE—
TRIAL, 2.

LICENSE.

See PATENT OF INVENTION.

LIEN.

1. *Mechanics' Lien*—*Running Account for Material*—*Prior General Arrangement to get Material from one Person*—*Time for Filing Lien*—*R. S. O. ch. 126, sec. 21.*—Where there is a convenient general arrangement, although not binding, between a contractor and a supplier of building material, whereby the former undertakes to procure from the latter all the material required for a particular building contract, so that, although the prices and quantities are not defined until orders are given and deliveries made, the entire transaction, although it may extend over some months, is linked together by the preliminary understanding on both sides; and a lien for all material so supplied is in time if filed within thirty days of the furnishing of the last item.

Judgment of MEREDITH, J., reversed. *Morris v. Tharle*, 159.

2. *Vendor and Purchaser*—*Vendor's Lien*—*Contract Price*—*Extra Work.*—The owner of certain land agreed with a company to build a factory thereon which, when completed, was to be conveyed to the

company in return for a certain number of shares.

During the progress of the building certain extra work for the company, agreed to be paid for in cash, became necessary, and was begun before but not completed until after the execution of the conveyance to the company:—

Held, that the owner had no vendor's lien for the value of the extra work. *Re The Toronto Drop Forge Company (Limited)*, 191.

3. *Mechanics' Lien*—*Registration of Lien*—*Time for*—*Alterations to Work subsequent to Completion.*—A lien was claimed for certain steel work done on a building which had been completed by 30th September, 1893, with the exception of the cutting down of certain bolts which it was afterwards found projected out of the walls too far, and which was done between 19th October and 25th October, 1893. The lien was registered on 17th November, 1893:—

Held, upon the authority of *Neill v. Carroll*, which is incorrectly reported in 28 Gr. 339, that the lien was registered too late, since the time should have been computed from 30th September, and was not extended by the alterations to the bolts. *Summers v. Beard et al.*, 641.

LIFE INSURANCE.

See INSURANCE.

LIQUOR LICENSE ACT.

See INTOXICATING LIQUORS GENERALLY.

LORD'S DAY ACT.

See JUSTICE OF THE PEACE, 2.

MANDAMUS.

See MUNICIPAL CORPORATIONS, 5
—TRIAL, 1.

MARRIAGE.

Solemnization of—Minister—“Religious Denomination”—R. S. O. ch. 131, sec. 1.—“The Reorganized Church of Jesus Christ of Latter Day Saints” is a religious denomination within the meaning of R. S. O. ch. 131, sec. 1; and a duly ordained priest thereof is a minister authorized to solemnize the ceremony of marriage.

Upon a case reserved, a conviction of such a priest for unlawfully solemnizing a marriage was quashed.

Semle, the words of the statute “church and religious denomination” should not be construed so as to confine them to Christian bodies. *Regina v. Dickout*, 250.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MASTER OF HIGH COURT.

Jurisdiction of, under Insurance Corporations Act, 1892.—See COMPANY, 6.

MASTER AND SERVANT.

1. *Workmen's Compensation Act—R. S. O. ch. 141—Negligence—*

Defect in Way—Superintendence—Use of Plank for Purpose not Intended.—The foreman of the defendant, a contractor for the erection of a building, desiring to pry up a part of the flooring, placed a new plank, supplied by the owners of the building, about eleven feet long by eight inches wide and three inches thick, which the evidence shewed had a knot in it two inches wide, and was cross-grained, across an opening in the ground floor, intending to use it as a fulcrum. The plaintiff, a labourer carrying a heavy scantling, was directed by the foreman to place it in another part of the building, and, while crossing the plank to do so, was precipitated into the cellar by the breaking of the plank at the knot, and was injured. It did not appear that there was any way beyond the plank:—

Held, that the plank was a “way” within the meaning of sub-section 1 of section 3 of the Workmen's Compensation for Injuries Act, and that the knot and cross-grain were defects in the way, for which the defendant was responsible. *Caldwell v. Mills*, 462.

2. *Negligence—Workmen's Compensation for Injuries Act—Defect—Knowledge of Danger—Full appreciation of Risk.*—To disentitle a workman from recovering damages for a defect in a machine, under the Workmen's Compensation for Injuries Act, he must not only have a knowledge of the danger he incurs, but also a thorough comprehension or appreciation of the risk he runs.

The plaintiff when formerly in the employment of the defendants had knowledge of a defect in a machine in their factory, and after leaving had returned to such employment, and had again worked at the

machine, knowing that the defect, of which the defendants were aware, had not been remedied. The jury having found that he did not fully appreciate the risk he ran:—

Held, that he was entitled to recover. *Haight v. The Wortman and Ward Manufacturing Company*, 618.

MECHANICS' LIEN.

See LIEN, 1, 3.

MEDICAL PRACTITIONER.

Practising Medicine—Apothecary—R. S. O. ch. 148—R. S. O. ch. 151.]

—A person went into a druggist's shop, stating he was sick, and describing his complaint, which the druggist said he believed to be diarrhoea, and after advising him as to diet, gave him a bottle of medicine, for which he charged 50 cents. The druggist stated that he had several kinds of diarrhoea mixture, and had sometimes to inquire as to symptoms in order to decide what mixture to give:—

Held, that this was practising medicine for gain within sec. 45 of the Medical Act, R. S. O. ch. 148:—

Held, also, that the fact of the druggist being registered under the Pharmacy Act, R. S. O. ch. 151, which entitled him to act as an apothecary as well as a druggist, did not authorize the practice of medicine.

The meaning of "apothecary" considered. *Regina v. Howarth*, 561.

See JUSTICE OF THE PEACE, 3.

MINING LANDS.

See NOTICE.

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MISDIRECTION.

See DEFAMATION, 2—EVIDENCE.

MORTGAGE.

1. *Interest—R. S. C. ch. 127, sec. 7—Mortgage to Secure Part of Purchase Money—Special Contract.*]
Under a mortgage given to secure the balance of purchase money, and in which the principal is payable by instalments extending beyond five years, the mortgagor is, at any time after such last named period, entitled to a discharge under section 7 of R. S. C. ch. 127, an Act respecting Interest, upon payment of the principal and interest together with three months' additional interest. *In re Parker—Parker v. Parker*, 373.

2. *Covenant—Dependent or Independent.*]
The proviso for payment in a mortgage made by defendant was that the mortgage was to be void on payment of \$3,250 and interest. Then followed the usual printed short form covenant for payment, to which was added in writing the words, "but before proceeding upon the covenant the mortgagee shall realize upon the lands mortgaged, and that the mortgagor shall then be liable only to the amount of \$600, or such lesser sum as will with the net proceeds from the lands make the \$3,250 and interest." The last clause in the mortgage, also added in writing, was that "in no event shall the personal liability of the mortgagor on his covenant exceed \$600:—"

Held, that the defendant was not to be subject to any liability until the lands were realized upon and the result shewed a deficiency, and

then only to the extent of \$600. *Wilson v. Fleming*, 388.

3. *Building Loan—Further Advances—Priority of Subsequently Registered Mortgage—Registry Act—Notice.*—After purchasing certain lands under an agreement which provided that \$2,000 of the purchase money was to be secured by mortgage subsequent to a building loan not exceeding \$12,000, the purchaser executed a building mortgage to a loan company for \$11,500, which was at once registered, but only part of the \$11,500 was then advanced. The plaintiff, who had succeeded to the rights of the vendor under the above agreement, then registered her mortgage for \$2,000, and claimed priority over subsequent advances made by the loan company under their mortgage, but without actual notice of the plaintiff's mortgage, or of the terms of the agreement for the sale of the land:—

Held, that the plaintiff was entitled to priority as claimed.

In such cases each new advance, whether in pursuance of a previous agreement or not, is a new dealing with the land, the acquisition of a new interest therein, and so comes within the provisions of the Registry Act, and, under that Act, the loan company were affected with notice of the registration of the plaintiff's mortgage. *Pierce v. Canada Permanent Loan and Savings Co.*, 426. (See now 57 Vic. ch. 34 (O).)

See DEED—DEVOLUTION OF ESTATES ACT, 1—FRAUDULENT CONVEYANCE.

MUNICIPAL CORPORATIONS.

1. *Public Highway—Obstruction by Private Person—Declaratory Judgment—Injunction.*—A municipal corporation has the right to have it declared, as against a private person, whether or not certain land is a public highway, and whether such person has the right to possess, occupy, and obstruct the same.

And in an action brought by the municipal corporation for the purpose, a declaration may be made according to the facts, and the defendant enjoined from possessing or occupying the land so as to obstruct the use of it as a public highway.

Fenelon Falls v. Victoria R. W. Co., 29 Gr. 4, followed.

Gooderham v. City of Toronto, 21 O. R. 120; 19 A. R. 641, applied and followed. *City of Toronto v. Lorsch*, 227.

2. *Construction of Drain—Ordinary Expenditure of Year—Submission of By-laws twice in one year—53 Vic. ch. 42 (O.)—Extra Territorial Limits.*—The construction of a drain being necessary both from a sanitary point of view and for the purpose of keeping in repair the highway under which a portion of it passed, the defendants resolved to construct it, if necessary, as part of the ordinary expenditure of the current year, but, nevertheless, submitted a by-law for its construction to the electors, which was defeated. They, however, proceeded with its construction, and again a second time in the same year submitted the by-law to the vote, when it was carried. It appeared that the drain might have been paid for out of the ordinary expenditure of the year without exceeding the statutable limit of taxation:—

Held, that the first by-law having been defeated did not prevent the submission of the second in the same year, nor did the fact of the work

having been commenced as an item of ordinary expenditure for the year, after the defeat of the by-law, incapacitate the defendants from again submitting a by-law for its construction :—

Held, also, that the defendants had power to pass the by-law notwithstanding that part of the work was to be done on land outside the territorial limits and without the consent of the adjacent municipality. *Kerfoot v. The Municipal Corporation of the Village of Watford*, 235.

3. *Negligence—Ice on Sidewalk—Liability of Owner of Adjacent Building—Non-liability of Tenant—Consolidated Municipal Act, sec. 531.*—

In an action against a city municipality in which the plaintiff recovered damages for injuries sustained by her slipping on ice which had formed on the sidewalk by water brought by the down pipe from the roof of an adjacent building, which was allowed to flow over the sidewalk and freeze, there being no mode of conveying it to the gutter, the owner of the building and the tenant thereof were, at the instance of the municipality, made party defendants under section 531 of the Consolidated Municipal Act. The pipe in its condition at the time of the accident, discharging the water upon the sidewalk, had existed from the commencement of the tenancy. A by-law of the municipality required the occupant of a building, or, if unoccupied, the owner, to remove ice from the front of a building abutting on a street within a limited time :—

Held, that the owner was, but the tenant was not, liable over to the municipality for the damages recovered. *Organ v. The Corporation of the City of Toronto*, 318.

4. *Way—Bicycle—Riding on Sidewalk—Conviction—Consolidated Municipal Act, sec. 496, sub-sec. 27.*—A bicycle is a “vehicle,” and riding it on the sidewalk is “encumbering” the street within the meaning of sub-section 27 of section 496 of the Consolidated Municipal Act, and of a by-law of a municipality passed under it.

A *certiorari* to bring up a conviction under the by-law was refused.

Regina v. Plummer, 30 U. C. R. 41, approved. *Regina v. Justin*, 327.

5. *Ditches and Watercourses Act, R. S. O. ch. 220, sec. 5, as amended by 52 Vic. ch. 49, sec. 2 (O.)—Default of Engineer—Mandamus.*—

An owner of land, desiring to construct a drain on his own land and to continue it through that of an adjoining owner, served him with the notice provided by the Ditches and Watercourses Act, R. S. O. ch. 220, sec. 5, as amended by 52 Vic. ch. 49, sec. 2 (O.), to settle the proportions to be constructed by each, and, on their failing to agree, served the clerk of the municipality with the notice provided for by such Act requiring the engineer to appoint a day to attend and make his award. The clerk immediately forwarded the notice to the engineer, who was absent, and who declined to attend :—

Held, that a mandamus would not lie against the municipal corporation to compel their engineer to act in the premises. *Dagenais v. The Corporation of the Town of Trenton*, 343.

6. *By-Law—Merry-go-Round—Con. Mun. Act (1892), sec. 489, sub-sec. 25—Certiorari—Six Days’ Notice of Application for—Waiver.*—A city by law, passed under sub-

section 25 of section 489 of the Con. Mun. Act (1892), 55 Vic. ch. 42 (O.), prohibited exhibitions of wax works, menageries, circus riding, and other such like shows, usually exhibited by show-men:—

Held, that this would not support a conviction for exhibiting a machine called a merry-go-round, as constituting no offence under the by-law or statute.

A preliminary objection, that the magistrate had not six full days' notice of the application for the writ of *certiorari* taken on the return of the motion to make absolute the order *nisi* to quash the conviction, was overruled, on the ground that the magistrate, on the facts appearing in the case, had waived the right to take the objection. *Regina v. Whitaker*, 437.

7. *Express Waggon—By-law Licensing Authorizing Rates Fixed Thereby to be Altered by Agreement—Ultra Vires—R. S. O. ch. 184, sec. 436 (O.).*—A by-law passed under section 436 of the R. S. O. ch. 184, for licensing express waggon, authorized the alteration by agreement of the rates fixed thereby:—

Held, beyond the powers conferred by the statute, and a conviction under the by-law for refusal to pay charges was quashed. *Regina v. Latham*, 616.

8. *By-law Exempting Manufactory—R. S. O. ch. 184, sec. 366—Right to Repeal—Good Faith—Acquiescence.*—A by-law, on the faith of which land had been purchased and a manufactory erected, was passed by a municipal council, under section 366 of the Municipal Act, R. S. O. ch. 184, by which the property was exempted from all taxation, etc., for a period of ten years

from the date at which the by-law came into effect.

The council subsequently, within the period of exemption, on the alleged ground that it was "expedient and necessary to promote the interests of the ratepayers," passed another by-law repealing the exempting by-law. The Court, being of opinion, on the facts as set out in the case, that the repealing by-law was passed in bad faith, to enable the council to collect taxes upon a property which was exempt under the section, and, in the absence of any forfeiture by the applicant of his rights, quashed the by-law as not within the powers of the council.

In this application a ground relied on by the council was that the applicant had erected more than two dwelling-houses on the exempted lands, whereby, under the terms of the by-law, the exemption ceased. This was done through oversight, and on the applicant's attention being called thereto, and on his undertaking to pay taxes thereon, a by-law was passed agreeing thereto and validating the exempting by-law; but, through inadvertence, was not sealed. The dwellings were subsequently assessed, and the taxes paid on them:—

Held, that the corporation by their acts and conduct were precluded from now setting this up as a breach of the by-law.

Semble, the words "manufacturing establishment" in the exempting by-law included land and everything necessary for the business.

Semble, also, the period of exemption was within the statute. *Alexander v. The Corporation of the Village of Huntsville*, 665.

9. *Contract for Construction of Sewer—Extension of Time—Power*

to Employ Labour to Hasten Work — Construction of Contract and Specifications.]—A contract for the construction of a sewer made between the corporation of a town and the plaintiff, payment for which was to be made by items according to schedule prices, provided for its completion within a limited time, which was extended by resolution of the council and again informally extended for a further period. The contract provided that if the contractor neglected or refused to prosecute the work to the engineer's satisfaction, the corporation might employ and place on the work such force of men and teams and procure such materials as might be deemed necessary to complete the work by the day named for completion and charge the cost thereof to the plaintiff; and by the specifications, which were made part of the contract, the same powers were conferred without any restriction as to time. The work not having been proceeded with to the engineer's satisfaction, the corporation, before the expiration of the second extension of time, exercised the powers above conferred:—

Held, that under the contract the power conferred could only be exercised during the time fixed for the completion of the work or the extension thereof, but under the specifications thereafter; and therefore, even if the corporation could not under the contract avail themselves of the second extension as granted informally, the powers were properly exercised under the specifications. *Mangan v. The Corporation of the Town of Windsor*, 675.

See ASSESSMENT AND TAXES, 1—PUBLIC HEALTH—PUBLIC SCHOOLS, 1—WATERS AND WATERCOURSES.

MUTUAL INSURANCE CO.

See INSURANCE, 5.

NAVIGATION.

See NEGLIGENCE, 2.

NEGLIGENCE.

1. *Agister of Horses—Bailee for Hire — Liability — Onus.*]—The plaintiff's mare, while in charge of the defendant under a contract of summer agistment, was killed by falling through the plank covering of a well in the defendant's yard, the existence of which was known to the defendant but not to the plaintiff, and to which yard the mare, with other horses of the defendant, had access from a field in which they were at pasture:—

Held (MEREDITH, J., dissenting), that the plaintiff had, on proof of these facts, given sufficient *prima facie* evidence of negligence to cast the onus on the defendant of shewing that reasonable care which an agister is bound to exercise; and a nonsuit was set aside.

Per BOYD, C.—The test in such cases is not necessarily the care which the agister may exercise as to his own animals. It is, in general, not what any particular man does, but what men as a class would do with similar property as a class.

Per MEREDITH, J.—The agister is not an insurer. The onus of proof of neglect of his duty is on the plaintiff, and had not been satisfied in this case. *Pearce v. Sheppard*, 167.

2. *Fire—Navigable Waters—Access to Shore and Navigation Rights—Public Rights—Private Rights—*

Faults on both Sides—Proximate Cause—Reasonable Precautions.]

The plaintiff, owner of a scow, had, without authority, moored it permanently to the shore of a basin artificially created by the excavation of land adjacent to a navigable river, which formed the boundary at that point between Canada and the United States. The soil of the shore and basin had been patented to certain persons, the usual rights of access to the shore and of navigation being reserved. The defendants, licensees of the owners of the shore, with authority to take, and for the purpose of taking, sand from the shore by means of their own scow and a hired tug, of which the master was the owner, placed the tug and scow alongside the plaintiff's scow, by order of the foreman of the defendants' scow, to whose orders the master of the tug was bound to conform.

Owing to the negligence of the master, the plaintiff's scow caught fire from sparks emanating from the smoke-stack of the tug, and was destroyed :—

Held, that the plaintiff, although he had a right to use the waters of the basin for navigation and the shore for landing, was not entitled to use them in the way he was doing :—

Held, however, that the defendants, while entitled to similar rights, and, in addition, to use the shore for any other purpose which did not interfere with the rights of the public, were bound to omit no reasonable precautions to avoid injuring the plaintiff's property ; and that they were liable for the negligence of the master of the tug.

Davies v. Mann, 10 M. & W. 546, applied and followed. *Cram v. Ryan et al.*, 500.

See LANDLORD AND TENANT, 4—MASTER AND SERVANT, 1, 2—MUNICIPAL CORPORATIONS, 3 — STREET RAILWAYS, 1, 2.

NEW TRIAL.

See DEFAMATION, 2—PROHIBITION, 1—RESTRAINT OF TRADE—TRIAL, 2, 3.

NOTICE.

Constructive Notice—Release of Debt — Consideration — Bonâ fide Purchaser for Value without Notice — Mining Lands.]

An unpatented and undeveloped mining property, the value of which was purely speculative, and the Government dues on which were unpaid, was conveyed to the plaintiff, the consideration mentioned in the deed being \$100, and he, for the expressed, but not actual, consideration of \$750, conveyed the property for the purpose of selling it for his own benefit to one of the defendants, who, after holding it for a year, conveyed it to his co-defendant, who had no actual notice of the circumstances, in consideration of the release of a debt of \$25 :—

Held, that the release of the debt was a sufficient consideration for the deed :—

Held, also, that, taking the circumstances and character of the property into account, the last grantee, who had made no inquiry, was not by reason of the consideration expressed in the deeds to and from the plaintiff, put upon inquiry so as to affect him with constructive notice of the plaintiff's rights.

Decision of **FALCONBRIDGE, J.**, at the trial reversed. *Moore v. Kane et al.*, 541.

See **MORTGAGE, 3—MUNICIPAL CORPORATIONS, 6.**

NOTICE OF MOTION.

See **QUO WARRANTO.**

NOVATION.

See **PRINCIPAL AND SURETY, 1.**

PARTIES.

See **COMPANY, 4.**

PARTNERSHIP.

1. *Sale of Goods to—Dissolution of—Agreement to look to Remaining Partner for Price—Evidence of.*—Where goods had been sold and delivered by the plaintiffs to a partnership consisting of the two defendants prior to the dissolution of the firm, the retiring partner set up in an action for the price of the goods that the plaintiffs had agreed to discharge him and look to the remaining partner alone. The only evidence of this was the fact that the plaintiffs had rendered an account for these goods, along with others for which the remaining partner alone was liable, to the remaining partner, and afterwards had accepted promissory notes for the amount, signed in the firm name, with the knowledge that the firm was then composed of the remaining partner only:—

Held, insufficient to shew an agreement such as was set up; for the facts were quite consistent with an intention on the plaintiffs' part to look to both defendants in case the notes should not be paid at maturity. *Bresse et al. v. Griffith et al.*, 492.

2. *Promissory Notes—Action against Indorser—Action against Same Person as Maker—Res Judicata—Judgment against Firm—Action upon Judgment against Members—Conduct—Election—Estoppel.*—The defendant was sued by the same plaintiffs in a former action as indorser of a promissory note, and judgment was entered in his favour upon the defence that he indorsed it for the accommodation of the plaintiffs without consideration. In this action he was sued upon the same note and others as a partner in the firm who were the makers of the notes, along with the other partner:—

Held, that the fact of his establishing his defence in the former action had no effect upon the question of his liability in this.

Nor were the plaintiffs debarred by the recovery of a judgment against the partnership from bringing an action upon the judgment against the individual members of it.

Clark v. Culien, 9 Q. B. D. 355, followed.

The defendant set up that the plaintiffs had elected to treat the other member of the firm as their sole debtor, by reason of their having proved their claim with and purchased the assets of the partnership from the assignee thereof under an assignment for the benefit of creditors, in which it was recited that the other was the only person composing the firm; and that the defendant had relied and acted upon their conduct and election, and they were

therefore estopped from suing him as a partner :—

Held, that, even if there was evidence that the defendant had acted in any way by reason of the plaintiffs' action, no estoppel arose, because the plaintiffs did nothing shewing an election not to look to him, and he had no right to assume an election from what they did, nor to act as if such an election had been made. *Ray et al. v. Isbister et al.*, 497.

PATENT OF INVENTION.

Licensee—Right to Terminate License.—The defendants were licensees of a patent under an agreement whereby they had to pay certain royalties to the patentee, and in consideration thereof were empowered to manufacture the patented machine in question, to the end of the term of the letters patent. Subsequently the defendants became possessed of an undivided one-fourth interest in the patent, and they thereupon gave notice to the plaintiff, who was the holder of the patent and entitled to the benefit of the above agreement, that they would, after a day named, terminate the agreement and make no further payments for royalties, but would manufacture the machine in question as owners of an undivided one-fourth interest in the patent :—

Held, that the defendants were entitled so to do.

If an interest is transferred in a patent, then it requires the consent of both parties to put an end to the transfer; but if the transaction is merely permission on certain terms to invade the monopoly, then the licensee may, at his option, renounce

the license and make the machine patented at his peril. *Noxon v. Noxon*, 401.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES.**

PAYMENT INTO COURT.

See **TRUSTS AND TRUSTEES.**

POLICE MAGISTRATE.

See **TRESPASS.**

POSSESSION.

After default.—See **BILLS OF SALE AND CHATTEL MORTGAGES.**

PRACTICE.

See **ADMINISTRATION—COMPANY, 4—PROHIBITION, 1, 3—TRIAL, 2, 3—TRUSTS AND TRUSTEES.**

PRINCIPAL AND SURETY.

1. *Novation—Extension of Time—Increase in Rate of Interest—Reservation of Rights against Surety—Discharge of Surety.*—A new agreement between the debtor and creditor extending the time for payment of the debt and increasing the rate of interest, without the consent of the surety, is a material alteration of the original contract, and releases the surety.

And a provision in such agreement reserving the rights of the creditor against the surety, though effectual as regards the extension of time, is idle as regards the stipula-

tion for an increased rate of interest, and, notwithstanding such reservation, the surety is discharged. *Bristol and West of England Land, Mortgage, and Investment Company v. Taylor*, 286.

2. *Extension of Time—Consent—Discharge of Co-Surety—Payment—Contribution.*—Where one of several sureties has been released by the creditor giving time to the principal debtor, with the consent of the other sureties, the latter cannot, upon payment of the debt, recover contribution from the co-surety.

Three out of four sureties on a note obtained from the holder an extension of time by a renewal during the absence and without the consent or approval of the fourth surety, the holder retaining the original note.

After payment of the renewal by the three who had obtained the extension, they brought an action against the fourth for contribution :—

Held, that they could not recover. *Worthington et al. v. Peck*, 535.

See GUARANTEE.

PRIORITIES.

See MORTGAGE, 3.

PRIVILEGE.

See EVIDENCE.

PROHIBITION.

1. *Time of Application for—Division Court—New Trial—Jurisdiction—Action on Promissory Note dated at one Place but made at another—R. S. O. ch. 51, sec. 86.*—

The defendant in an action in the first Division Court in the county of York, brought upon a promissory note dated "Toronto," but actually made at Wiarton, filed a notice disputing the jurisdiction. Judgment, however, was given in the action against him in his absence, and he moved for and obtained a new trial, paying the money into Court as a condition, and afterwards applied for an order of transference, which was refused. Before the new trial he applied for a prohibition :—

Held, that by moving for a new trial and paying the money into Court, the defendant had not waived his right, and the want of jurisdiction being clear, prohibition should be granted.

If the right to prohibition exists, it is optional with the defendant to apply at the outset of the Division Court proceedings, or he may wait till the latest stage of appeal so long as there is anything to prohibit.

Judgment of MEREDITH, J., reversed. *In re Brazill v. Johns*, 209.

2. *Division Court—Amount beyond Jurisdiction—Right of Judge to Amend by Striking off Excess—Division Court Rules 8, 188.*—Where a claim for an account beyond the jurisdiction of the Division Court is brought in that Court, the Judge at the trial has no power to strike out the excess so as to bring the amount within the jurisdiction. *Cleveland Press v. Fleming et al.*, 335.

3. *Division Court—Action upon Order in High Court for Payment of Costs—Judgment—Rules 866, 934.*—Prohibition granted to restrain the enforcement of a judg-

ment in a Division Court in an action brought upon an order of a Judge in an action in the High Court ordering the defendant in the Division Court action to pay certain costs arising out of his default as a witness.

Notwithstanding the broad provisions of Rule 934, an order of the Court or of a Judge is not for all purposes and to all intents a judgment; and no debt exists by virtue of such an order as was sued on here.

Rule 866 means that an order may be enforced in the action or matter in which it is, as a judgment may be enforced, and does not extend to the sustaining of an independent action upon the order. *Re Kerr v. Smith*, 473.

4. *Division Court—Jurisdiction—Amount Ascertained by Signature—R. S. O. ch. 51, sec. 7, sub-sec. (c).*—The defendant covenanted in a lease to pay the plaintiff \$210 on a certain date as rent reserved. A payment of \$34 having been made, leaving the sum of \$180.40 due for principal and interest, the plaintiff brought his action in the Division Court for that sum, and prohibition was applied for upon the ground that the claim was not within the jurisdiction of the Division Court:—

Held, that the original amount of the claim was ascertained by the signature of the defendant under sub-sec. (c) of sec. 7, R. S. O. ch. 51, and that the Division Court had jurisdiction.

McDermid v. McDermid, 15 A. R. 287, and *Robb v. Murray*, 16 A. R. 503, specially referred to and considered. *In re Wallace v. Virtue*, 558.

See DIVISION COURT—INTOXICATING LIQUORS, 2, 4.

PROMISSORY NOTE.

See PARTNERSHIP, 1, 2—PROHIBITION, 1.

PROXIMATE CAUSE.

See NEGLIGENCE, 2.

PUBLIC HEALTH.

R. S. O. ch. 205—By-law Prohibiting Unloading Manure on Railway Premises—Conviction—Validity of.—*Held*, that the unloading of manure from a car on a certain part of railway premises into waggons, to be carried away, came within the terms of a by-law amending the by-law appended to the Public Health Act, R. S. O. ch. 205, and prohibiting the unloading of manure on said part of said premises; that the use of the word "manure" in the amending by-law was not of itself objectionable; and that it was not essential to shew that the manure might endanger the public health.

A conviction for unloading a car of manure on the premises, as contrary to the by-law, was therefore affirmed. *Regina v. Redmond. Regina v. Ryan. Regina v. Burk*, 331.

PUBLIC SCHOOLS.

1. *Cost of Erection—Ultra vires Contract—Municipal Corporation—Injunction—54 Vic. ch. 55, sec. 116 (O.).*—The school board of a city, town, or incorporated village has no authority to contract for the building of a school house, until the necessary funds have been provided, under 54 Vic. ch. 55, sec. 116, or for one involving the expenditure of

any greater sum than has been so provided.

The plaintiff, a freeholder, rate-payer, and elector of the town of Fort William, and a supporter of the public schools therein, suing on behalf of himself and all other rate-payers, was held entitled to an injunction to restrain the proceeding with the erection of a school house, in a case where the contract price exceeded the amount provided under section 116, and to an order compelling the repayment to the school corporation of certain sums paid by individual members of the school board to the contractors for a portion of the work already performed. *Smith v. The Fort William School Board et al.*, 366.

2. *By-law Altering School Sections—Time for Passing.*—Sub-section 3 of section 81 of the Public Schools Act, 54 Vic. ch. 55 (O.), provides that by-laws passed under the said section for altering, etc., school sections, shall not be passed later than 1st May in the year, and shall not take effect before the 25th December next thereafter:—

Held, that the word “year” as used therein means the calendar year commencing 1st January and ending 31st December, and that a by-law altering certain school sections passed on the 25th September was invalid. *In re Trustees of School Section No. 5 of the Township of Asphodel and Thomas Humphries*, 682.

PURCHASER.

See NOTICE.

QUO WARRANTO.

Information—High School Trustee—Civil Proceeding—Courts—

Single Judge—Motion—Notice.—

A motion for an information in the nature of a *quo warranto* is the proper proceeding to take to inquire into the authority of a person to exercise the office of a High School trustee.

Askew v. Manning, 38 U. C. R. 345, 361, followed:—

Such a proceeding is a civil, not a criminal, one; and is properly taken before a single Judge in Court, by way of motion, upon notice. *Regina ex rel. Moore v. Nagle*, 507.

RAILWAYS AND RAILWAY COMPANIES.

1. *Special Contract Limiting Liability—Validity of.*—The plaintiff on shipping a horse by defendants' railway signed a document, called a “Live Transportation Contract,” which stated that the company received the horse for transport at the special rate of \$7.20; and, in consideration therefor, it was mutually agreed that defendants should not be liable for any loss or damage, etc., except in case of collision, etc., and should in no case be responsible for an amount exceeding \$100 for each or any horse, etc., transported. In a collision caused by the negligence of the defendants, the horse was killed:—

Held, that the agreement constituted a special contract limiting the defendants' liability to the amount named, and that section 246, sub-section 3, of the Railway Act, 51 Vic. ch. 29 (D.), did not apply so as to prevent the defendants from claiming the benefit of the contract where negligence was proved.

Vogel v. Grand Trunk R. W. Co., 2 O. R. 197, 10 A. R. 162, 11 S. C. R. 612; and *Bate v. Canadian Paci-*

fic R. W. Co., 14 O. R. 625, 15 A. R. 388, considered. *Robertson v. Grand Trunk Railway Co.*, 75.

2. *Railway Frog—Railway Company—Packing—Continuous Duty*—51 Vic. ch. 29, sec. 262, sub-sec. 3 (D.).]—The duty of a railway company under sub-sec. 3 of sec. 262, 51 Vic. ch. 29 (D.), is not only to fill with packing the spaces behind and in front of every railway frog but continuously to keep the same filled. *Misener v. The Michigan Central Railroad Company*, 411.

See STREET RAILWAYS.

REFORMATION.

Of Voluntary Deed.]—See DEED.

REGISTRATION.

See LIEN, 3—MORTGAGE, 3.

RELEASE.

See NOTICE.

REMAINDERMAN.

See TENANT FOR LIFE.

REPEAL OF BY-LAW.

See MUNICIPAL CORPORATIONS, 7.

REPLEVIN.

See LANDLORD AND TENANT, 2.

RES JUDICATA.

See PARTNERSHIP—TRIAL, 1.

RESTRAINT OF TRADE.

Covenant—Construction of—Reasonableness—Certainty—Damages for Breach—Evidence—New Trial—Refusal of Judge to Submit Question to Jury—Non-direction.]—The male defendant sold his business of a wholesale and retail confectioner to the plaintiff, and covenanted that he would not during a limited period, either by himself alone or jointly with or as agent for any other person, carry on or be employed in carrying on the business of a retail confectioner in the same city, which should in any way interfere with the business sold to the plaintiff, and that he would, to the utmost of his power, endeavour to promote the interest of the plaintiff amongst his (the defendant's) customers. This defendant had carried on his wholesale business in the basement of his premises, and his retail business in the shop above, of which latter his wife, the other defendant, had the management. The business carried on in the shop included the sale of cakes, candy, etc., and the serving of lunches. In the sale to the plaintiff were included an assignment of the lease of these premises and all the chattels and fixtures, as well those used in the serving of lunches as in other ways. During the period limited by the covenant, and while the plaintiff was carrying on the business in the same way as the male defendant had previously carried it on and upon the same premises, the defendants began a precisely similar business in a shop in the same street, the shop being leas-

ed and the retail business carried on in the name of the wife, and that branch of the business conducted by her as theretofore, while the husband carried on the wholesale business in the basement. The jury found that the retail business was in fact that of the husband :—

Held, that the serving of lunches was part of the business of a retail confectioner according to the meaning to be ascribed to those words in the covenant.

2. That the covenant was reasonable and sufficiently certain to be enforced by the Court.

3. That general loss of custom after the commencement of the new business by the defendants could be shewn by the plaintiff as evidence to go to the jury of damages resulting to him from such business.

Ratcliffe v. Evans, [1892] 2 Q. B. 524, applied and followed.

4. That damages were properly assessed up to the date of the judgment.

Stalker v. Dunwich, 15 O. R. 342, followed.

5. It is no ground for a new trial that the Judge refused to submit any particular question to the jury, but if the Judge refuses to charge the jury in respect to the subject matter of any question which counsel desire to have submitted, it may be made the subject of a motion for a new trial for non-direction. *Turner v. Burns et ux.*, 28.

RIGHT OF WAY.

See STREET RAILWAYS, 2.

RULES.

CON. RULE 271.]—*See* ADMINISTRATION.

CON. RULE 324.]—*See* COMPANY, 4.
CON. RULE 326.]—*See* COMPANY, 4.
CON. RULE 384.]—*See* FRAUDULENT CONVEYANCE.

CON. RULE 866.]—*See* PROHIBITION, 3.

CON. RULE 934.]—*See* PROHIBITION, 3.

DIVISION COURT RULES 8, 188.]—*See* PROHIBITION, 2.

SALE.

By Last Surviving Executor.]—*See* EXECUTORS AND ADMINISTRATORS.

Of Goods.]—*See* PARTNERSHIP.

SCHOOLS.

See PUBLIC SCHOOLS—QUO WARRANTO.

SEARCH WARRANT.

See INTOXICATING LIQUORS, 1.

SECURITY.

See COMPANY, 6.

SEDUCTION.

Death of Father—Action by Mother for Seduction in Father's Lifetime—Service.]—In an action, after the death of the father, by the mother for the seduction of her daughter in the lifetime of the father, who was an invalid supported by the mother and daughter, no evidence of the actual relationship of mistress and servant was given :—

Held, that the action was not maintainable. *Entner v. Benneweis*, 407.

SEPARATE ESTATE.

See HUSBAND AND WIFE—INSURANCE, 4.

SERVICE OF PAPERS.

See COMPANY, 4.

SHARES.

See COMPANY, 3, 5.

SHERIFF.

See BILLS OF SALE AND CHATTEL MORTGAGES..

SHOP LICENSES.

See INTOXICATING LIQUORS, 2, 4.

SINGLE JUDGE.

See QUO WARRANTO.

SLANDER.

See DEFAMATION, 2.

SPECIFIC PERFORMANCE.

Contract for Exchange of Lands—Title not in Plaintiff—Knowledge of Defendant.—Where the plaintiff, at the time he entered into a contract with the defendant for the exchange of lands, had no title to the lands he proposed to exchange, which were, to the knowledge of the defendant at the time of the contract, vested in the plaintiff's wife:—

Held, in an action for specific performance, that the defendant could not withdraw on the ground that the plaintiff had no title, at any rate before the time fixed for the completion of the exchange; and the plaintiff, having tendered a conveyance from his wife before action, was entitled to succeed; for the defendant, having entered into the contract knowing that it did not bind the estate, but only the person, of the plaintiff, must be taken to have relied from the beginning upon the promise of the plaintiff to procure the concurrence of the owner, and could not set up that the plaintiff was not the owner.

Dictum of KEKEWICH, J., in *Wylson v. Dunn*, 34 Ch. D. 569, not followed. *St. Denis v. Higgins*, 230.

See DEVOLUTION OF ESTATES ACT, 3—EXECUTION.

STATUTES.

13 Eliz. ch. 5.]—*See* FRAUDULENT CONVEYANCE.

R. S. C. ch. 127, sec. 7.]—*See* MORTGAGE, 1.

R. S. C. ch. 129.]—*See* COMPANY, 2, 3.

R. S. C. ch. 129, sec. 9.]—*See* COMPANY, 1.

R. S. C. ch. 164, sec. 78.]—*See* CRIMINAL LAW.

R. S. C. ch. 174, sec. 62.]—*See* TRESPASS.

R. S. C. ch. 174, sec. 143.]—*See* CRIMINAL LAW.

R. S. C. ch. 176, sec. 8.]—*See* JUSTICE OF THE PEACE, 1.

R. S. O. ch. 44, sec. 53, sub-sec. 5.]—*See* TRUSTS AND TRUSTEES.

R. S. O. ch. 51, sec. 7, sub-sec. (c).]—*See* PROHIBITION, 4.

R. S. O. ch. 51, sec. 70 (b).]—*See* DIVISION COURT.

R. S. O. ch. 51, sec. 86.]—*See* PROHIBITION, 1.

R. S. O. ch. 52, sec. 110.]—*See* TRIAL, 3.

R. S. O. ch. 64, sec. 25.]—*See* EXECUTION.

R. S. O. ch. 73, sec. 1, sub-sec. 2.]—*See* TRESPASS.

R. S. O. ch. 108.]—*See* DEVOLUTION OF ESTATES ACT, 1, 2, 3.

R. S. O. ch. 108, sec. 9.]—*See* DEVOLUTION OF ESTATES ACT, 3.

R. S. O. ch. 114.]—*See* MORTGAGE, 3.

R. S. O. ch. 125, secs. 1, 5.]—*See* BILLS OF SALE AND CHATTEL MORTGAGES.

R. S. O. ch. 126, sec. 21.]—*See* LIEN, 1.

R. S. O. ch. 131, sec. 1.]—*See* MARRIAGE.

R. S. O. ch. 136.]—*See* INSURANCE, 2, 3.

R. S. O. ch. 136, secs. 5, 6.]—*See* INSURANCE, 4.

R. S. O. ch. 141.]—*See* MASTER AND SERVANT, 2.

R. S. O. ch. 141, sec. 3, sub-sec. 1.]—*See* MASTER AND SERVANT, 1.

R. S. O. ch. 143, secs. 2, 5.]—*See* ANNUITY.

R. S. O. ch. 143, sec. 11, sub-sec. 1.]—*See* LANDLORD AND TENANT, 3.

R. S. O. ch. 148, sec. 45.]—*See* JUSTICE OF THE PEACE, 3.

R. S. O. ch. 148, sec. 45.]—*See* MEDICAL PRACTITIONER.

R. S. O. ch. 151.]—*See* MEDICAL PRACTITIONER.

R. S. O. ch. 157.]—*See* INTOXICATING LIQUORS, 3.

R. S. O. ch. 167, sec. 114, sub-sec. 19.]—*See* INSURANCE, 5.

R. S. O. ch. 184, sec. 366.]—*See* MUNICIPAL CORPORATIONS, 8.

R. S. O. ch. 184, sec. 436.]—*See* MUNICIPAL CORPORATIONS, 7.

R. S. O. ch. 194, sec. 11, sub-sec. 14.]—*See* INTOXICATING LIQUORS, 2, 4.

R. S. O. ch. 194, sec. 50.]—*See* INTOXICATING LIQUORS, 3.

R. S. O. ch. 194, sec. 91.]—*See* INTOXICATING LIQUORS, 2.

R. S. O. ch. 194, sec. 131.]—*See* INTOXICATING LIQUORS, 1.

R. S. O. ch. 203, sec. 1.]—*See* JUSTICE OF THE PEACE, 2.

R. S. O. ch. 205.]—*See* PUBLIC HEALTH.

R. S. O. ch. 220, sec. 5.]—*See* MUNICIPAL CORPORATIONS, 5.

R. S. O. ch. 220, sec. 6.]—*See* WATERS AND WATERCOURSES.

51 Vic. ch. 22 (O.).]—*See* INSURANCE, 3.

51 Vic. ch. 29, sec. 246, sub-sec. 3 (D.).]—*See* RAILWAYS AND RAILWAY COMPANIES, 1.

51 Vic. ch. 29, sec. 262, sub-sec. 3 (D.).]—*See* RAILWAYS AND RAILWAY COMPANIES, 2.

52 Vic. ch. 47 (D.).]—*See* CRIMINAL LAW.

52 Vic. ch. 49, sec. 2 (O.).]—*See* MUNICIPAL CORPORATIONS, 5.

53 Vic. ch. 33, sec. 30, sub-sec. 4 (D.).]—*See* BILLS OF EXCHANGE AND PROMISSORY NOTES.

53 Vic. ch. 39, sec. 5 (O.).]—*See* INSURANCE, 6.

53 Vic. ch. 39, sec. 6 (O.).]—*See* INSURANCE, 3.

53 Vic. ch. 42 (O.).]—*See* MUNICIPAL CORPORATIONS, 2.

53 Vic. ch. 56, sec. 1 (O.).]—See INTOXICATING LIQUORS, 2, 4.

54 Vic. ch. 18 (O.).]—See DEVOLUTION OF ESTATES ACT, 1.

54 Vic. ch. 18, sec. 2 (O.).]—See DEVOLUTION OF ESTATES ACT, 3.

54 Vic. ch. 55, sec. 81, sub-sec. 3 (O.).]—See PUBLIC SCHOOLS, 2.

54 Vic. ch. 55, sec. 116 (O.).]—See PUBLIC SCHOOLS, 1.

54 & 55 Vic. ch. 110, sec. 4 (D.).]—See COMPANY, 3, 5.

55 Vic. ch. 26, secs. 2, 3, 4 (O.).]—See BILLS OF SALE AND CHATTEL MORTGAGES.

55 Vic. ch. 39, sec. 54, sub-secs. 5, 7, (O.).]—See COMPANY, 6.

55 Vic. ch. 42, sec. 489, sub-sec 25 (O.).]—See MUNICIPAL CORPORATIONS, 6.

55 Vic. ch. 42, sec. 496, sub-sec. 27 (O.).]—See MUNICIPAL CORPORATIONS, 4.

55 Vic. ch. 42, sec. 531 (O.).]—See MUNICIPAL CORPORATIONS, 3.

55 Vic. ch. 48, sec. 2, sub-sec. 10 (O.).]—See ASSESSMENT AND TAXES, 3.

55 Vic. ch. 48, sec. 34 (O.).]—See ASSESSMENT AND TAXES, 3.

55 Vic. ch. 48, sec. 52 (O.).]—See ASSESSMENT AND TAXES, 2.

55 Vic. ch. 48, sec. 124 (O.).]—See ASSESSMENT AND TAXES, 1.

56 Vic. ch. 20 (O.).]—See DEVOLUTION OF ESTATES ACT, 1.

STREET RAILWAYS.

1. *Persons Entitled to be Transferred—Illegal Removal from Car—Illness Consequent on Exposure to Cold—Damages Therefor—Remoteness.*]—A passenger on a street railway having the right to be transferred from a car on one street line

to that of another street line on the railway was refused such right by the conductor of the car to which he had the right to be transferred, and was forced to leave it :—

Held, that he was entitled to recover damages occasioned by an illness caused by exposure to the cold in leaving the car, such damages not being too remote.

The defendants, an incorporated company, were the successors of certain persons who had purchased the road, and although no conveyance of the road to the defendants was proved, it was shewn that the persons working the railway at the time of the occurrence were in defendants' employment, and that the car in question was in charge of their employees :—

Held, sufficient evidence that the defendants were operating the road so as to render them liable to the plaintiff. *Grinsted v. The Toronto Railway Company*, 683.

2. *Rate of Speed—Right of Way—Collision—Negligence.*]—The right of way which street railway cars have over the portion of the street on which the rails are laid, is not an exclusive right or a right requiring vehicles or pedestrians at all hazards to get out of the way at their peril; and, notwithstanding the absence of any regulations as to speed, the cars must be run at such a rate as may be reasonable under the circumstances of each particular case.

The plaintiff was sitting on a wagon which was being driven on that part of the street occupied by the rails, and while going down a steep incline, a motor car and trailer coming along behind, by reason of the motor-man not having proper control of the car, and of the excessive speed

thereof, the waggon was run into and the plaintiff injured :—

Held, that the defendants were liable therefor. *Ewing v. Toronto Railway Company*, 694.

SUMMARY CONVICTION.

See JUSTICE OF THE PEACE GENERALLY—MARRIAGE—MEDICAL PRACTITIONER—MUNICIPAL CORPORATIONS 4, 6, 7—PUBLIC HEALTH.

SUMMARY TRIALS ACT.

See JUSTICE OF THE PEACE, 1.

SUNDAY.

See JUSTICE OF THE PEACE, 2.

SURETY.

See PRINCIPAL AND SURETY.

SURRENDER.

Of Shares.—See COMPANY, 3, 5.

Of Lease by Operation of Law.—See LANDLORD AND TENANT, 1.

TAXES.

See ASSESSMENT AND TAXES—TENANT FOR LIFE.

TENANT FOR LIFE.

Remainderman — Payment of Taxes—Productive and Unproductive Property.—As between a tenant for life in possession and a re-

mainderman of property, part of which is productive and part unproductive, the life tenant will not be permitted to receive rents from part of the property while he allows taxes to accumulate on the vacant portion.

Order made for a receiver of the estate of the tenant for life to pay the arrears of taxes out of the rents. *Re Denison—Waldie v. Denison et al.*, 197.

TENANT AT WILL.

See WATERS AND WATERCOURSES

TIME.

See LIEN, 1, 3—MUNICIPAL CORPORATIONS, 6—PRINCIPAL AND SURETY—PUBLIC SCHOOLS, 2—TRIAL, 2—WATERS AND WATERCOURSES.

TITLE TO LAND.

See SPECIFIC PERFORMANCE.

TRANSFER.

Of Passenger on Street Railway.—See STREET RAILWAYS.

TRESPASS.

Police Magistrate—Jurisdiction—Warrant to Compel Attendance of Witnesses—R. S. C. ch. 174, sec. 62—Arrest—Imprisonment—Excess—Damages.—The plaintiff, a barrister, having been subpœnaed to give evidence for the prosecution in a criminal case before a police magistrate, attended at the time named ;

but, on the case being adjourned, did not then attend, and the case was further adjourned; the prosecutor forthwith laid an information on oath before the magistrate, that the witness was a material one, and that it was probable he would not attend to give evidence; upon which the magistrate issued a warrant under sec. 62, R. S. C. ch. 174, addressed to the chief constable or other police officers, etc., and to the keeper of the common gaol of the county and city, directing them to bring the witness before him on the date of the adjournment, some five days distant. The witness was forthwith arrested by two police officers and brought to the office of one of the police inspectors, and on his refusing to answer the questions usually put to criminals, except those as to his name and address, the inspector ordered him to be searched, which was done, and his personal property and private memorandum book were taken from him, the latter being opened and read by the inspector. He was then taken to the cells, where he remained some twenty minutes, when he was brought before the magistrate, and on his giving his personal undertaking to appear on the day named, he was liberated. In an action against the police magistrate and the police inspector:—

Held, as to the magistrate, reversing the judgment of ROSE, J., at the trial, that having jurisdiction by virtue of sec. 62 of R. S. C. ch. 174 to issue the warrant, he incurred no liability, even though he might have erred as to the sufficiency of the evidence brought before him, and on which he acted.

As to the liability of the inspector the Court was evenly divided, GALT, C. J., being of opinion that

his acts, however unreasonable, were done in the execution of his office, and that under sub-sec. 2 of sec. 1, R. S. O. ch. 73, he was protected. MACMAHON, J., agreeing with ROSE, J., at the trial, was of opinion that there being no authority in the warrant to search and confine, he could not justify thereunder for the excess.

Quære, whether section 62 authorizes the issue of the warrant or its enforcement an unreasonable length of time before the day named for the attendance of the witness. *Gordon v. Denison and Stephen*, 576.

TRIAL.

1. *Division Court—Res Judicata—Question for Jury—Jurisdiction—Mandamus to Judge.*—When an issue arises on the plea *res judicata* the identity of the facts in the former case is matter for the jury when the trial is by a jury in a Division Court. In a case in a Division Court where the defence of *res judicata* had been raised, and in which a jury notice had been given, the Judge determined the case himself, and refused to allow it to be tried by a jury:—

Held, that he had no jurisdiction to do so, and that a mandatory order must go to compel him to try the case in accordance with the practice of the Court. *In re Cowan v. Affie*, 358.

2. *Jury—Improper Conduct towards—Motion for New Trial—Time when to be Made.*—During the trial of an action for libel the defendants published in their newspaper a sensational article with reference thereto. The plaintiff's

solicitor was aware that the article had come to the hands of one or more of the jury, but did not bring the matter to the notice of the Court, or take any action with respect to it, and proceeded with the trial to its close, when the jury brought in verdicts for the defendants.

Upon a motion for a new trial upon the ground of improper conduct towards and undue influence upon the jury:—

Held, that the application was too late. *Tiffany v. McNee et al. Metcalf v. McNee et al.*, 551.

3. *Defendants' Right of Challenge—Defending Separately—Mistrial—R. S. O. ch. 52, sec. 110.*—The defendants, having delivered separate defences and being separately represented at the trial, claimed to be entitled under the Jurors Act, R. S. O. ch. 52, sec. 110, to four peremptory challenges each, which, though objected to by the plaintiff, was conceded by the Judge, and the defendants challenged six jurors between them, and the trial proceeded, resulting in a verdict for the defendants:—

Held, upon motion by the plaintiff, that there had been mistrial, and the plaintiff was entitled to a new trial.

Under the above section the defendants were only entitled to four peremptory challenges between them, and, inasmuch as the plaintiff took the objection at the time, he had not waived his right to complain by proceeding with the trial. *Empey v. Carscallen*, 658.

See RESTRAINT OF TRADE.

TRUSTS AND TRUSTEES.

Payment into Court—Benevolent Society—Insurance Moneys—Con-

Acting Claims—O. J. A., sec. 53, sub-sec. 5.—On an application by a benevolent society for leave to pay insurance money into Court, claimed by different parties:—

Held, that sub-section 5 of section 53 of the Judicature Act extends the benefit of the Act for the relief of trustees to such cases, and that the society was entitled to pay the money in.

Decision of FERGUSON, J., reversed. *Re Bajus*, 397.

See INSURANCE, 3—WILL, 5, 6.

ULTRA VIRES.

See MUNICIPAL CORPORATIONS, 7—PUBLIC SCHOOLS, 1.

VENDOR'S LIEN.

See LIEN, 2.

VEHICLE.

See MUNICIPAL CORPORATIONS, 4.

VOLUNTARY CONVEYANCE.

See FRAUDULENT CONVEYANCE.

VOLUNTARY DEED.

Will not be Reformed against Grantor.—See DEED.

WAIVER.

See MUNICIPAL CORPORATIONS, 6—PROHIBITION, 1—TRIAL, 2.

WAREHOUSEMAN.*See* BAILMENT.

WARRANT.*See* DAMAGES—TRESPASS.

WATERS AND WATERCOURSES.

Ditches and Watercourses Act—Award—Affirmance by County Judge—Jurisdiction of Engineer of Municipal Corporation—Determination by Court—Requisition—Assent of Majority of Owners—Notice—"Owner," Meaning of—Tenant at Will—Benefit from Work to be done under Award—Notice of Letting Work—Time.—1. Where the engineer of a municipal corporation purports to make an award under the Ditches and Watercourses Act with respect to the making of a drain, the affirmance of such award by the County Court Judge does not preclude the High Court from entertaining the objection that the engineer had no jurisdiction to make the award; nor is such an objection one for the determination of the County Court Judge alone.

Murray v. Dawson, 17 C. P. 588, distinguished.

2. In the absence of a resolution of the municipal council such as is provided for by sec. 6 (b) of the Ditches and Watercourses Act, R. S. O. ch. 220, the question whether the engineer has jurisdiction to make an award depends upon whether, before filing the requisition, the owner filing it has obtained the assent in writing of a majority of the owners affected or interested, as provided by sec. 6 (a); if he has obtained such assent, the engineer is

immediately upon such filing clothed with jurisdiction; and the absence of the notice (Form D.) required by sec. 6, would not deprive him of such jurisdiction, but would form only a ground of appeal against his award.

3. The assent of the municipal corporation as one of the land-owners interested may be shewn by resolutions passed by the council directing the engineer to proceed with the work.

4. The term "owner" as used in the Act means the assessed owner; and a tenant at will may be an owner affected or interested within the meaning of the Act.

5. The decision of the County Court Judge as to matters over which the engineer has jurisdiction cannot be reviewed by the Court; and whether the plaintiffs were benefited by the proposed work was a matter to be determined by the engineer and the subject of appeal to the County Court Judge.

6. The mere publication by the engineer, within a year after the affirmance of an award, of a notice that he would let the work to be done upon the land of one of the persons affected by the award, and that such letting would take place after the expiry of a year from such affirmance, does not afford any ground for an action of trespass. *York et al. v. Township of Osgoode et al.*, 12.

See NEGLIGENCE, 2.

WAY.

See MASTER AND SERVANT, 1.

WILL.

1. *Construction—Condition Precedent—Condition Subsequent—*

Death of Testatrix Feloniously caused by Devisee—Lapse.—A testatrix devised part of a lot to her husband, adding: "He to pay off the mortgage to * . Should he not pay the said mortgage off at maturity, the same land to become the property of my children and sold with the remaining portion of said lot." The land thus devised had been previously conveyed to her by her husband, and subsequently the latter, for valuable consideration, again conveyed the land to her, subject to the mortgage, which she covenanted to pay off, and did pay off some days before it actually matured. Afterwards the husband killed the testatrix, and was convicted of the crime of manslaughter. Between her death and his conviction, and notwithstanding the above conveyances, he purported to convey the land to his brother in trust to sell, and out of the proceeds to pay for his defence at his trial for murder, and to hold the balance in trust for him, the grantor; and the brother now claimed the land as against the representatives of the testatrix:—

Held, (1) that the condition in the above devise as to paying off the mortgage was a condition subsequent, and its performance having become impossible by the prior payment of the mortgage, became void.

(2) That the gift in favour of the children was in the nature of an executory devise which could only take effect on the happening of the event referred to, namely, the default of the husband in not paying the mortgage, but as there was no such default, the children took nothing by the devise.

But (3) that by his felonious act in killing his wife, the husband had absolutely precluded and debarred himself from obtaining any benefit

under her will or out of her estate, and his grantee, his brother, could stand in no better position than himself, and, therefore, there was an intestacy as to these lands. *McKinnon v. Lundy*, 132.

2. *Conversion—Blended Fund—“My Own Right Heirs”*—*Literal Construction.*—A testator by his will directed that his trustees should, in certain events, after the death of his wife and daughter, sell all his estate, real and personal, and divide the same equally amongst his "own right heirs," who might prove their relationship, etc.:—

Held, that the conversion directed created a blended fund derived from realty and personalty to be distributed equally among the same class of persons, and that the words "my own right heirs" signified those who would take real estate as upon an intestacy, and not next of kin, and that children of any deceased heirs at law were entitled to share *per stirpes*. *Coatsworth et al. v. Carson et al.*, 185.

3. *Domicil—Forum—Legacy to Unincorporated Association—Validity of.*—A testator domiciled in the State of Missouri, U.S., at the time of the execution of his will and at the time of his death, bequeathed personal property situate in this Province to a Lodge of Oddfellows in the State of New York, U.S., which, although unincorporated at the time of the testator's death, was subsequently authorized by law to take and hold, in the names of trustees, property devised to the lodge.

In an action to test the validity of the bequest:—

Held, that the parties having selected their forum in this Province, the action must be dealt with

here according to the law of the testator's domicile, which, in the absence of evidence to the contrary, would be presumed to be the same as the law of this Province:—

Held, also, there being no prohibitory law of the legatees' domicile, the bequest to the lodge was a valid bequest to the members thereof, and that the trustees of the lodge could be added as parties defendants, on behalf of all the members.

Walker v. Murray, 5 O. R. 638, followed. *Graham et al. v. The Canandaigua Lodge No. 236 of the Independent Order of Oddfellows of the State of New York*, 255.

4. *Construction—Bequest to Trustees of Church—Mixed Fund—Application of—Directions.*]—A testator by his will bequeathed a sum of money to the trustees of a church “to be * * used in the payment of any indebtedness on said church, and for such other purposes as they may deem wise.” At the time the will took effect there was no debt on the church:—

Held, that the reference in the will meant outlay in connection with the church such as repair and maintenance or any obligation incurred for which the land was not liable, and that the bequest was valid.

Bunting v. Marriott, 19 Beav. 163, followed.

The will directed the bequest to be paid out of a mixed fund derived from the sale of land and personalty:—

Held, as far as the real estate was concerned, that the gift failed.

Directions as to the application of the fund. *Ostrom et al. v. Alford et al.*, 305.

5. *Devise—Life Estate—Remainder—Vested Estate—Period of Vest-*

ing—Trust—Conversion into Personality—“Pay or Apply.”]—Devise of land to widow for life for the support of herself and testator's children, with power to sell, etc., as she might think proper for the general benefit and purposes of his estate; and upon her death, devise of such part of land as might remain undisposed of to trustees to stand seized and possessed of for the benefit of testator's children, in equal shares, and to pay to each his share at majority; with a provision that upon the death of any child before majority without issue, the trustees were to pay or apply his share to and among the survivors:—

Held, that the estates of the children became equitably vested upon the death of the testator, subject to the mere powers for sale contained in the will; and so vested as realty, for there was no trust which required, and the use of the words “pay” and “pay or apply” did not work, a conversion of realty into personalty. *McDonell v. McDonell et al.*, 468.

6. *Direction to Sell Lands—Names or Descriptions of Devisees—Trust—Charitable Use—Mortmain—Augmentation of Particular Fund or Residuary Estate—Interest—Power of Executor—Dower—Election—Costs.*]—A testator by his will provided as follows:—

“I do order and direct that my executor sell the real estate owned by me, such sale to be made inside of three years from the date of my decease, and out of the proceeds of the said sale to pay to the Archbishop of the Diocese of Toronto \$500; to the Bishop of the Diocese of Hamilton \$500; to be applied for the education of young men for the priesthood; and the balance invested by my executor in the proportion of

\$15 for my wife and \$8 for my mother.

"At my mother's death, I order that her proportion * * be divided * * " between five nieces, and that "on my wife's death, her proportion * * be divided " between nephews and nieces.

"All the residue of my estate not hereinbefore disposed of, I give, devise, and bequeath unto my wife":—

Held, that the bequests to the Archbishop and Bishop named in the will being essentially different from their names in their corporate capacity, were intended for them individually, subject to the trust declared, the purpose of which was a charitable use, and that the money being derived from the sale of land, the legacies failed, and the amount went to augment the residuary gift of the particular fund out of which it was directed to be paid, and not the general residue of the estate.

As the land was directed to be sold within three years from the testator's death, the legacies bore interest from the date when the lands should have been sold.

That as there was no special devise of the real estate, but only a direction to the executors to sell and pay legacies, the land and rents arising therefrom belonged to the widow, under the general residuary gift to her, and that the executor had no power to lease.

That the widow was not bound to elect between her dower and the will.

Costs ordered to be paid out of the real estate, as the litigation had related to it. *McMylor v. Lynch et al.*, 632.

See DEVOLUTION OF ESTATES ACT GENERALLY—EXECUTORS AND ADMINISTRATORS—INSURANCE, 2, 3.

WINDING-UP ACT.

See COMPANY GENERALLY—INSURANCE, 5.

WORDS.

"*Apothecary.*"]—See MEDICAL PRACTITIONER.

"*Actual and Continued Change of Possession.*"]—See BILLS OF SALE AND CHATTEL MORTGAGES.

"*Encumbering.*"]—See MUNICIPAL CORPORATIONS, 4.

"*Given for a Patent Right.*"]—See BILLS OF EXCHANGE AND PROMISSORY NOTES.

"*In Trust.*"]—See COMPANY, 5.

"*Live Transportation Contract.*"]—See RAILWAYS AND RAILWAY COMPANIES, 1.

"*Manufacturing Establishment.*"]—See MUNICIPAL CORPORATIONS, 8.

"*Manure.*"]—See PUBLIC HEALTH.

"*My Own Right Heirs.*"]—See WILL, 2.

"*Owner.*"]—See WATERS AND WATERCOURSES.

"*Pay*" "*Pay or Apply.*"]—See WILL, 5.

"*Persons who Become Creditors.*"]—See BILLS OF SALE AND CHATTEL MORTGAGES.

"*Religious Denomination.*"]—See MARRIAGE.

"*Vehicle.*"]—See MUNICIPAL CORPORATIONS, 4.

"*Way.*"]—See MASTER AND SERVANT, 1.

WORK AND LABOUR.

See MUNICIPAL CORPORATIONS, 9.

WORKMEN'S COMPENSATION FOR INJURIES ACT.

See MASTER AND SERVANT.

In Hilary Term, 1894, the under mentioned gentlemen were called to the Bar:—

JAMES CLAYTON HAIGHT,
With Honours and Gold Medal.

CHARLES PLAXTON BLAIR, ROBERT BRADFORD, CHARLES FRANCIS ELLERBY EVANS-LEWIS, GEORGE AUGUSTUS HARCOURT, GEORGE HENRY DONAGH LEE, BENJAMIN ST. GEORGE LEFROY, DAVID PLEWES, JR., WILLARD LEROY PHELPS.

In the same Term the under mentioned gentlemen were admitted and sworn in as Solicitors:—

ROBERT BARRIE, CHARLES PLAXTON BLAIR, ROBERT BRADFORD, CHARLES FRANCIS ELLERBY EVANS-LEWIS, GEORGE AUGUSTUS HARCOURT, GEORGE HENRY DONAGH LEE, BENJAMIN ST. GEORGE LEFROY, DAVID PLEWES, JR., WILLARD LEROY PHELPS, JOHN REEVE, JOHN WILLIAM WINNETT.

